

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

: Civil Action
: No. 3:09CV620
: April 2 , 2013

COMPLETE TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

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1 (The proceedings in this matter commenced at
2 9:43 AM --0)

3 THE CLERK: Case number 3:09CV620, ePlus,
4 Incorporated v. Lawson Software, Incorporated.

5 If counsel will please stand, state your name
6 for the record and identify the party they represent.

7 MR. STRAPP: Michael Strapp representing the
8 plaintiff, ePlus.

9 MS. ALBERT: Jennifer Albert representing the
10 plaintiff, ePlus.

11 MR. MERRITT: Craig Merritt representing the
12 plaintiff, ePlus, along with my partner Paul Jacobs.

13 THE COURT: All right.

14 MR. THOMASCH: Your Honor, Daniel Thomasch
15 for defendant Lawson Software, Incorporated. With me
16 at counsel table, the attorneys, Josh Krevitt, Richard
17 Mark, Dabney Carr, and Chris Dusseault.

18 THE COURT: All right. Glad to have you.

19 All right. We're here on the issue of the
20 show cause for contempt and the issue of how to deal
21 with the Court of Appeals mandate on the question of
22 injunction.

23 The first thing we'll do is hear the evidence
24 on the contempt in your case.

25 MR. THOMASCH: Your Honor, may I just note

1 for the record I feel compelled. I know Your Honor is
2 familiar with our position, but I do feel we need to
3 put on the record, Your Honor, our objection to
4 proceeding with the contempt proceeding in this
5 sequence of events. Because this is a civil contempt
6 case and not a criminal contempt case, Lawson cannot
7 be considered in contempt of anything other than an
8 injunction that's in force.

9 THE COURT: The injunction is in force, Mr.
10 Thomasch, and the only issue is how does it get
11 modified. The Federal Circuit did not change the
12 injunction. It said you are to consider how to modify
13 it. So right now it's in force.

14 MR. THOMASCH: I understand that, Your Honor.
15 It does seem that both parties have agreed that the
16 injunction as issued in 2011 can no longer stand, and
17 we believe it is a threshold issue to determine what
18 the injunction is that we're alleged to be in
19 violation of.

20 THE COURT: The injunction is already extant
21 that you're in violation of. The only thing you can
22 be in violation of is that part of it that applies to
23 what is it? Claim 26.

24 MR. STRAPP: Yes.

25 THE COURT: That's the only part you can be

1 in violation of. I'm just now hearing the evidence.

2 MR. THOMASCH: Thank you, Your Honor.

3 THE COURT: You-all, I hope, will not be in
4 the sweat chamber much longer.

5 MR. STRAPP: Your Honor, with your permission
6 we'd like to offer an opening statement.

7 THE COURT: All right. I've read all of what
8 you have had. So you can make one, but you don't need
9 to go into great detail. The only thing you're
10 putting on evidence about is whatever your contention
11 is with respect to contempt to the remaining claim.

12 MR. STRAPP: That's correct.

13 THE COURT: Is that right?

14 MR. STRAPP: That's correct.

15 THE COURT: All right.

16 MR. STRAPP: We have some slides. So we're
17 going to put them up on the screen, Your Honor.

18 THE COURT: All right.

19 MR. STRAPP: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. STRAPP: At the outset of this contempt
22 hearing, I think it's important to just briefly
23 understand how we got here. More than two years ago,
24 January 2011, there was a jury verdict that included a
25 finding that Lawson Configurations 3 and 5 infringe

1 Claim 26 of the '683 Patent.

2 THE COURT: Before you lay too much emphasis
3 on how long it's been, remember one thing. I gave you
4 the opportunity to litigate this while the matter of
5 the mandamus was on appeal, and you-all chose not to
6 do that. I guess for economic reasons. I don't know.
7 But I gave you the choice to do it. And we would have
8 been finished with it long ago had you opted to do
9 what you were given the option to do.

10 So I can't place too much emphasis on the
11 duration, Mr. Strapp, after you were given that
12 option. So whatever period of time is the duration,
13 some of that is on your shoulders. I'm not quite sure
14 how we allocate all that later, but I just think you
15 need to keep that in mind.

16 MR. STRAPP: Understood.

17 Almost immediately after the jury verdict,
18 within a matter of days, in fact, Lawson began the
19 process of developing a replacement for RSS. Within a
20 month after that, an evidentiary hearing on ePlus's
21 motion for a permanent injunction was held. And the
22 Court may recall that it was at that hearing on
23 March 25 that the executive vice president of Lawson
24 at the time, Dean Hager, talked about severe harm that
25 would befall Lawson's customers were the Court to

1 enter an injunction.

2 In May 2011, May 18 to be precise, Lawson
3 made available to its customers via a free 20-minute
4 download a software module that it calls RQC. And
5 five days after that Your Honor entered the
6 injunction.

7 Now, during the four months between
8 January 2011 and May 2011, there were some important
9 decisions made by Lawson that have critical
10 consequences as the evidence will show over the next
11 few days.

12 First, Lawson decided, although it had began
13 developing RQC within a few days after the jury
14 verdict, to withhold from the Court during the
15 injunction proceedings any specific information about
16 that new module. And contemporaneous Lawson emails
17 will show that this was a calculated and strategic
18 decision that was made by Lawson to maximize their
19 odds of defeating ePlus's injunction motion.

20 The second decision Lawson made during that
21 four-month window was whether to significantly change
22 the infringing Configurations 3 and 5 or instead to
23 make some minor modifications.

24 Now, Lawson, the evidence will show,
25 considered but rejected substantial changes because of

1 the expected negative response of its customers and
2 because it realized it would require actually a
3 significant investment of time and money to try to
4 design around ePlus's patents.

5 So instead, as Lawson told its customers, it
6 changed RQC so that RQC wasn't really a change at all,
7 but instead retained 100 percent of the functionality
8 of RSS.

9 And a third decision that Lawson made in that
10 four-month window between the verdict and the
11 injunction was also motivated by placating its
12 customers in the aftermath of the injunction.

13 The evidence will show that Lawson
14 specifically designed this new module RQC so that it
15 actually could be run in parallel with RSS. In other
16 words, the infringing system with RSS and the
17 infringing system with RQC, it could be run
18 simultaneously by Lawson's customers.

19 Actually, Lawson went one step further and
20 instructed its customers on how to continue running
21 RSS even after the customers had downloaded RQC.

22 Now, the key question at this hearing, as
23 Your Honor has framed in a January 24 order, is
24 whether Lawson was at any time after May 23, 2011, in
25 violation of the injunction. And ePlus will show that

1 Lawson violated the injunction in the followings ways:

2 First, evidence will be put on by ePlus to
3 show that RQC and the configurations with RQC are not
4 more than colorably different than the configurations
5 with RSS.

6 Second, ePlus will put on evidence to prove
7 that Lawson uses Configurations 3 and 5 with RQC to
8 infringe Claim 26, and that it induces its customers
9 to do the same.

10 And, third, ePlus will show that Lawson
11 violated the injunction by actually inducing its
12 customers to continue using the original infringing
13 configurations with RSS.

14 The first segment of the hearing will be
15 devoted to colorability. And in TiVo, the Federal
16 Circuit gave a few guideposts as to how to deal with
17 this colorability issue.

18 First, the Federal Circuit said, "Ask whether
19 or not the modifications were made to what it called
20 randomly chosen features."

21 Now, what the Federal Circuit meant by the
22 term "randomly chosen features" is whether the
23 modification was made to a feature of the claim that
24 has nothing to do with the actual functionality or
25 structure recited in the claim element.

1 Now, this alone can be dispositive. If the
2 Court were to find, for example, that the modification
3 Lawson made, and the parties agree on what that
4 modification is, it has nothing to do with the claim
5 element of Claim 26, it means the inquiry is over.
6 The accused products with RQC is not more than
7 colorably different from the product that was already
8 found to infringe.

9 But if the Court finds that the modification
10 wasn't directed to a randomly chosen feature, the next
11 step is to evaluate whether or not the modification is
12 significant. And the Federal Circuit teaches that one
13 guidepost for determining significance of a
14 modification is whether the new design-around module
15 is innovative or if it's simply a degradation in
16 functionality.

17 A modification that just goes backwards in
18 functionality is more likely to be insignificant.
19 Conversely, a modification that's innovative will be
20 more likely to be found a significant and more than
21 colorable change.

22 But one thing that is not relevant to the
23 colorability analysis is the defendant's purported
24 diligence and good faith efforts. The TiVo decision
25 makes clear any evidence that Lawson presents over the

1 next few days about the time and expense it incurred
2 to create RQC or, for example, opinions of counsel it
3 received that blessed its RQC design, are irrelevant.
4 Those are the same defenses that were raised by
5 EchoStar, the defendant in TiVo, and that were
6 rejected by the Federal Circuit as not bearing on the
7 colorability question.

8 So the colorability analysis will focus not
9 on Lawson's purported good faith efforts, but instead
10 on whether Configurations 3 and 5 with RQC are more
11 than colorably different than Configurations 3 and 5
12 with RSS.

13 Your Honor may recall these block diagrams
14 that were presented during the trial that show the
15 different software building blocks that make up these
16 various Lawson software configurations.

17 Now, when the Court addresses this
18 colorability question, I think it's important to keep
19 in mind that even though Configurations 3 and 5, which
20 you see side by side here on this slide, consist of
21 several different software modules. It's undisputed
22 the parties agree that no relevant modifications were
23 made to any of these modules except to the RSS module.

24 So if you take a look at the slide, you'll
25 see at the bottom there's a yellow building block.

1 That's called the platform technology foundation. And
2 it's made up of LSF and process flow. Right above
3 that is a blue block called S3 procurement modules.
4 That consists of three separate modules; purchase
5 order, requisitions, inventory control.

6 And at the top you'll see there's an orange
7 box, which is Punchout. And a purple box in
8 Configuration 5, which is electronic data interchange.

9 All of those modules remain exactly the same.
10 No source code changed. No functionality changed.
11 And that's undisputed here. The parties agree on
12 that.

13 The only module that was changed was RSS.
14 RSS became requisition center or RQC.

15 Now, the parties agree not only about the
16 lone module that was changed, but also about the
17 single modification that was made to that module
18 that's relevant to this hearing.

19 So what is that modification? Well, as
20 Lawson put it in its pre-hearing brief, it was a
21 modification to remove from RQC a user's ability to
22 combine either items from item master in a Punchout
23 vendor or items from multiple Punchout vendors in a
24 single requisition.

25 Of course, the colorability question is

1 whether or not that modification is significant.

2 EPlus submits that --

3 THE COURT: The modification that you're
4 talking about here is a functionality modification.

5 MR. STRAPP: That's correct.

6 THE COURT: All right.

7 MR. STRAPP: EPlus submits that this
8 functionality modification that Lawson made to RQC is
9 insignificant. In fact, it's one that Lawson
10 described internally and to its customers as no real
11 change at all.

12 You'll hear evidence regarding insignificance
13 of this modification from ePlus's technical expert,
14 Dr. Alf Weaver, who is a professor of computer science
15 at the University of Virginia, but much of the
16 evidence regarding insignificance of this modification
17 will come from the mouths of Lawson's own witnesses.
18 That's who we intend to call in our case-in-chief,
19 both current and former employees.

20 The current employees are Dale
21 Christopherson, who is the director of ERP
22 development, Keith Lohkamp, Lawson's product director
23 of supply chain management, and Scott Hanson, who is
24 the practice director of technology at Lawson.

25 Through deposition destination, ePlus will

1 call the former executive vice president and submit
2 his testimony to you, and that's Dean Hager's
3 testimony.

4 The documents produced by Lawson in this case
5 will also establish that the configurations containing
6 RQC are not more than colorably different.

7 Now, when ePlus submits evidence over the
8 next few days from Lawson's own documents, we would
9 ask you to focus on the following questions:

10 First of all, what did Lawson say internally?
11 What did Lawson employees say to each other about this
12 modification?

13 Second: What did Lawson tell its customers
14 about this modification?

15 Third: What did Lawson's customers think
16 about this modification?

17 Now, Lawson demonstrated this new product in
18 something called a webinar. That's where 800 Lawson
19 customers and other folks log on. Lawson gives a live
20 demonstration over the Internet and says, Here's new
21 product. Here's how it works.

22 Well, during that webinar, questions and
23 answers were taken from customers in which customers
24 gave their impressions of what they thought of this
25 new product. Some of this evidence, we think, is

1 revealing, as well.

2 And I think after you see all of that
3 evidence, it will be interesting to compare and
4 contrast what Lawson said and what Lawson's customers
5 said with what Lawson's lawyers will tell you over the
6 next few days.

7 Let's take a look first at what the evidence
8 will show about what Lawson's employees said to each
9 other regarding the modification made to RQC. For
10 example, and you'll see several documents similar to
11 these, Scott Hanson, who'll testify here live,
12 informed his direct report that while this is a new
13 product, the new product is a change in the user
14 interface only. The procurement business
15 functionality and data remains the same.

16 Another Lawson employee said, "I tell the
17 customer if they ask about the differences between RSS
18 and RQC, it's just a difference in a web front, and
19 really just looks and feel like RSS.

20 Now, that's very similar to what Lawson told
21 its customers. For example, in responding to a
22 question regarding training issues that it received
23 from a customer called Western Municipal Water
24 District, Lawson said, Since RQC has 100 percent of
25 the existing functionality of RSS, no training issues

1 have been identified.

2 Likewise, in a response to an inquiry from a
3 customer called Cleveland Clinic regarding the
4 interplay of RQC with Punchout and how that was
5 affected by the modification, Lawson said, With regard
6 to Punchout, RQC will function as RSS did.

7 And last, Lawson told its customer Norton
8 Health Care, we've developed this replacement product
9 RQC. It has all of the functionality RSS had and
10 more.

11 And those are the same impressions Lawson's
12 customers got when they had a chance to look at RQC.
13 For example, an outside contractor from Art Crandell
14 said RQC appears to look, function and operate the
15 same as RSS.

16 And the Children's Health of Atlanta customer
17 representative said, Hey, the view looks very similar
18 to current RSS.

19 Now, although Lawson said one thing
20 internally and to its customers, and its customers had
21 a very similar impression to the message Lawson gave,
22 you'll hear something different from Lawson's lawyers
23 over the next few days. They are going to try to tell
24 you that there were significant functional limitations
25 through this modification or that this modification

1 made the product significantly more cumbersome, but
2 those arguments simply, we submit, cannot be squared
3 with what Lawson's own employees said about RQC. And
4 Lawson has to live with the fact that it chose not to
5 make any significant modifications to its software.

6 After the colorability case is finished,
7 ePlus is going to turn to infringement. Infringement
8 with respect to RQC. And the question that TiVo tells
9 us to ask is whether the newly accused system, that
10 is, the configurations with RQC meet each element of
11 Claim 26. I have the elements of Claim 26 up there on
12 a slide. And ePlus will show that each of these
13 elements are met through testimony from Alf Weaver,
14 Dale Christopherson and Keith Lohkamp.

15 But I think it's important to note that the
16 infringement phase of this proceeding, it's not going
17 to be written on a blank slate. The Federal Circuit
18 has already said with respect to Claim 26, which is
19 the claim at issue here, that there's no serious
20 dispute that Lawson's customers infringed Claim 26,
21 and the same types of facts that ePlus presented to
22 the jury regarding Claim 26 at trial will be presented
23 over the next few days.

24 For example, the evidence will show that more
25 than 350 Lawson customers have taken the RQC download

1 and are in various phases of migrating to the product.

2 The evidence will show that Lawson has
3 realized tens of millions of dollars in licensing and
4 maintenance revenue for the accused configurations.
5 It's always important to note the Federal Circuit said
6 it's not just Lawson's customers, but Lawson itself,
7 there's substantial evidence that Lawson itself
8 infringed this Claim 26.

9 The type of evidence cited by the appeals
10 court included installation, maintenance, webinars,
11 professional services. And that very kind of evidence
12 that the Federal Circuit characterized as substantial
13 is the type of evidence the ePlus will show over the
14 next few day.

15 For example, ePlus will show that Lawson
16 itself went live with an infringing configuration with
17 RQC, that Lawson's so-called RQC SWAT team assisted
18 customers by actually performing hands on
19 installations of RQC, and that Lawson offered guides
20 and webinar presentations for infringing
21 configurations with RQC to its customers.

22 EPlus will show evidence that this one
23 modification the that the parties agree on that I
24 already mentioned, the RQC modification, that actually
25 has no bearing on any one of the elements of Claim 26.

1 So if we take a look at the first element of
2 Claim 26, it says, Maintaining at least two product
3 catalogs on a database containing data relating to
4 items associated with the respective sources."

5 EPlus will show that this element of Claim 26
6 is satisfied in any one of three ways. Through a user
7 who has an item master that has two product catalogs.
8 Through a user of Configurations 3 and 5 who has
9 connection to two different Punchout sites, each with
10 a single vendor. Or through a user who has a
11 connection to a multi vendor site.

12 And the modification to RQC, it just doesn't
13 prevent a user from maintaining the product catalogs
14 in any of these three ways.

15 Likewise, with respect to the selecting and
16 searching elements of Claim 26, ePlus will -- first of
17 all let me just point out. The Court already issued a
18 claim construction on these terms that is binding for
19 these proceedings. And it's also important, too.
20 That construction said that the selecting the product
21 catalogs limitation must allow for selecting only one
22 catalog.

23 And in so ruling, the Court rejected Lawson's
24 claim construction argument that a user must select
25 two or more catalogs. Thus, ePlus will show the

1 selecting and searching elements are also met in any
2 one of three ways.

3 THE COURT: Slow down.

4 MR. STRAPP: If the user selects to search
5 one or more catalogs from an item master, if a user
6 selects to search a single vendor Punchout site, or if
7 a user selects to search one or more catalogs within a
8 single multi vendor Punchout site.

9 The next element of Claim 26 requires
10 building a requisition using data relating to selected
11 matching items and their associated sources. And I
12 underlined here in this slide the word "sources."
13 You'll see there's an apostrophe around the last "s."
14 The reason there's an apostrophe there is that the
15 language in the claim clearly states the element is
16 satisfied by building a requisition using items that
17 are associated with one source or building a
18 requisition using data related to selecting matching
19 items from more than one source.

20 So ePlus will present evidence that
21 requisitions using configurations 3 and 5 with RQC can
22 be built through a single source or several sources in
23 one or more catalogs in item master, using data
24 relating to selected items associated with a single
25 source from a single vendor Punchout site, or using

1 data from a single source or several sources in one or
2 more catalogs within a multi vendor Punchout site.

3 The RQC modification that we'll discuss and
4 focus on the next few days also has no bearing on the
5 element of Claim 26 that requires processing the
6 requisition to generate one or more purchase orders.
7 This element by its plain terms is satisfied by
8 processing the requisition to generate one purchase
9 order or more than one purchase order.

10 So a requisition that's built using
11 Configurations 3 and 5 with RQC can be processed to
12 generate one purchase order for selecting matching
13 items with one selected matching item or more than one
14 purchase order for selected matching items associated
15 with several sources.

16 And, finally, here, the last element of the
17 claim talks about determining whether selected
18 matching item is available in inventory. Lawson
19 doesn't even contend that the RQC modification has any
20 impact whatsoever on this particular claim element.
21 And you'll hear evidence that this element is
22 satisfied when a user of Configurations 3 or 5 checks
23 whether an item is available in inventory either
24 through Punchout vendor inventory or through an EDI
25 purchase report.

1 The evidence will show that Lawson is in
2 contempt not only because the configurations with RQC
3 infringe Claim 26 but also because Lawson has
4 encouraged and assisted its customers to continue
5 using the original infringing configurations with RSS.

6 Indeed, you'll hear evidence that Lawson
7 specifically designed RQC so it can be run in parallel
8 with RSS.

9 THE COURT: Is there evidence why?

10 MR. STRAPP: Is there evidence why? Yes.

11 THE COURT: Why it was designed that way?

12 MR. STRAPP: The implication of the evidence
13 that I've seen is that they didn't want their
14 customers to be frustrated by requiring their
15 customers to take on a new product all of a sudden in
16 light of the injunction. They wanted their customers
17 to continue using the old technology if they felt more
18 comfortable with RSS instead of requiring them to
19 immediately switch over to RQC.

20 THE COURT: Somebody will address this?

21 MR. STRAPP: Yes. Evidence regarding this
22 will be presented both through Scott Hanson and to the
23 extent that Lawson calls Elizabeth Homewood, she will
24 also address this issue.

25 Now, what Lawson told its customers is,

1 Here's what we're going to do. We're going to design
2 RQC and RSS so they can run in parallel. Even with
3 Punchout installed as well. They said, If there are
4 multiple users at your company who are using RSS and
5 RQC, don't worry. We've designed it so they can both
6 run each module at the same time.

7 They told other customers, You've got lots of
8 different ways you can do requisitions now. You can
9 do RSS. You can do RQC. Whatever you choose.

10 And Scott Hanson, who will be testifying,
11 said, When we install, we go out to our customer sites
12 and put in this new module, we don't touch RSS at all.
13 We don't uninstall it. We don't remove it from our
14 customer's systems. Therefore, both products are
15 available on the client's server.

16 So you may hear Lawson say that all this
17 hearing is about is the configurations with RQC. But,
18 in fact, Lawson is also in violation of the injunction
19 because it specifically designed these configurations
20 you see on your screen, Configurations 3 and 5 with
21 RQC, to permit RQC and RSS to run in parallel.

22 THE COURT: Are you telling me that there are
23 systems out there right now that are running RSS?

24 MR. STRAPP: From the evidence --

25 THE COURT: Even though they're running it in

1 parallel.

2 MR. STRAPP: From the evidence that was
3 presented to us during discovery, that's what we saw.

4 Now, Lawson actually went one step further.
5 They actively instructed their customers on how to
6 continue using RSS even after they had downloaded RQC.
7 For example, Lawson provided some detailed technical
8 instructions on how to continue running RSS even after
9 downloading RQC to a non-healthcare customer within
10 weeks after the injunction had entered.

11 And they gave that customer, which was called
12 Western Lake Superior Sanitary, two different detailed
13 technical options on how they could continue running
14 RSS with RQC.

15 The first option was manually create RSS
16 bookmarks under something called a portal
17 administration in the bookmark manager file.

18 The second technical option was you could
19 also edit the Lawson LD dot shopping dot CSV file if
20 you want to keep on running these two modules together
21 at the same time.

22 After evidence is presented on colorability
23 and infringement, ePlus will present evidence
24 regarding the remedies it seeks. EPlus will present
25 evidence related to its request for an award of

1 disgorgement. It will ask for a multiplier for a
2 finding of wilful infringement. It will ask for a
3 declaration of an exceptional case and award of
4 attorneys' fees.

5 To the extent Lawson doesn't come into
6 compliance with the injunction if a contempt is found,
7 ePlus will seek a course of remedy in the form of a
8 daily fine going forward to prevent ongoing contempt
9 until such time as Lawson can prove that it's in
10 compliance with the Court's order.

11 And to the extent Lawson comes back to you a
12 few months from now and says, Hey, we've got
13 design-around 3.0 in the works, we would ask that Your
14 Honor require Lawson come and seek pre-approval before
15 that new design around be issued to customers.

16 The Court has broad discretion to fashion a
17 remedy here for violation of its own orders. And the
18 Court has recognized already that disgorgement is an
19 appropriate remedy.

20 The Court has also stated that if Lawson
21 wants to deduct costs from the revenues it realized
22 from licensing, servicing and maintaining infringing
23 Configurations 3 and 5, it, Lawson, bears the burden
24 of proving that those costs are related to and should
25 be deducted from the revenues it earned from

1 infringing activity.

2 EPlus will present expert testimony from
3 Dr. Keith Ugone who will show the Court that Lawson
4 has earned total revenue for the accused modified
5 Configurations 3 and 5 with RQC through November 30,
6 2012, which is the last date on which Lawson provided
7 financial information of 29.4 million.

8 And Dr. Ugone will also show that Lawson's
9 gross profits derived from that infringing activity
10 are 18.1 million.

11 But the fact that Lawson withheld information
12 from this Court two years ago at the injunction
13 proceedings is also relevant to the remedies phase.
14 Your Honor said in November 8, 2011, at a hearing,
15 that the remedy ePlus is entitled to and the interest
16 this Court has in enforcing its own injunction is
17 informed if, in fact, Lawson came in here and made
18 misrepresentations about the length of time it would
19 take to accomplish their design around and the expense
20 that it would require.

21 Lawson made no mention of its design-around
22 efforts at the March 25 evidentiary hearing on the
23 injunction or at the April 4 oral argument. In fact,
24 the evidence will show Lawson made a concerted
25 decision to withhold information from the Court.

1 During the injunction proceeding, the Court
2 may recall that Lawson's lawyers and Mr. Dean Hager
3 actually argued that it would take tremendous amounts
4 of money and time to replace RSS with a non-infringing
5 substitute.

6 The Court may recall on April 1st, 2011, in a
7 signed pleading submitted to this Court by Lawson's
8 lawyers, Lawson contended, This is not software that
9 will be uploaded over the weekend. That's April 1st,
10 2011.

11 May 27, 2011, less than two months later,
12 Lawson's CEO at the time, a man named Terry Devis,
13 sent a letter out to over 800 Lawson customers said.
14 The download should take 20 to 30 minutes.

15 THE COURT: Is there a difference between
16 downloading and uploading?

17 MR. STRAPP: Your Honor, the only witness who
18 I think can really explain that is Dean Hager.

19 THE COURT: Did you ask him?

20 MR. STRAPP: We asked him that at his
21 deposition. We asked him several questions and we
22 will submit that testimony to Your Honor.

23 THE COURT: All right.

24 MR. STRAPP: Also on March 25, 2011, it was
25 Mr. Hager who said, From an implementation

1 perspective, knowing how long these things take, I
2 don't believe it's overstating to say it's going to
3 take nine months on average.

4 Well, two months later at this webinar that I
5 told you about where over 800 customers were watching
6 RQC being demonstrated live, Lawson said to set aside
7 any concerns from its customers that it was going to
8 be a large undertaking to get RQC running, they said,
9 Don't worry about it. Lawson was the first
10 implementation. We went live using our own internal
11 IT department with RQC in under one day of elapsed
12 time.

13 Now, this Court's recognized on several
14 occasions civil contempt is not unique to patent law.
15 18 U.S.C. Section 401, that's the section that vests
16 the Court with statutory authority to wield the power
17 of contempt if there's disobedience or resistance to a
18 lawful order.

19 Moreover, the Supreme Court more than a
20 century ago said, The power to punish for contempt is
21 inherent in all courts. Its existence is essential to
22 the preservation of order in judicial proceedings, to
23 the enforcement of judgments and orders, and
24 consequently, to the due administration of justice.

25 At the conclusion of these proceedings, ePlus

1 will ask the Court to exercise its inherent authority
2 to enforce its own orders and to find Lawson in
3 contempt of the injunction.

4 Thank you, Your Honor.

5 MR. THOMASCH: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. THOMASCH: Your Honor, I intend in my
8 opening statement to focus on the phase 1 proceedings,
9 and I will make that clear as I discuss it.

10 Before I get there, I do want to address one
11 matter Your Honor raised. You will not hear any
12 evidence that any of Lawson's customers are running
13 RSS. There was a period of time, Your Honor will
14 recall, a six-month period of time when healthcare
15 systems, 277 identified hospitals and healthcare
16 providers, were permitted to be continuing to run RSS.

17 During that time period, and it was actually
18 front-loaded in that time period, but during that time
19 period those customers were transitioning over.
20 There's one reason you would operate the system in
21 parallel. You operate the system in parallel so that
22 you can have a test environment and a production
23 environment. And what you do is you're doing the same
24 searches on the new system that you haven't tested out
25 yet and the old system that you know works. You know

1 how the requisitioning works.

2 THE COURT: That time period was allowed, Mr.
3 Thomasch, because I was told that it would take a long
4 time to do this.

5 MR. THOMASCH: Your Honor --

6 THE COURT: And that's the only reason it was
7 allowed. In fact, it was requested by Lawson I think
8 maybe a longer period, but I can't recall that. And
9 so I'm not quite sure that I take a great deal of
10 comfort in hearing what you're saying if you're saying
11 that that process lasted more than the short period of
12 time it has now been shown to use the RQC --

13 MR. THOMASCH: I'm not --

14 THE COURT: -- assuming that the RQC is
15 different than the RSS.

16 MR. THOMASCH: Yes. The RQC -- I want to
17 focus on that because that's the key issue for phase
18 1, but RQC is different. It was used for the
19 period -- and not for the full six months. You'll see
20 most occurred at the front end. The idea was to
21 transition the customers from RSS to RQC. They ran it
22 in a test environment and a production environment
23 side by side to confirm that it worked. Then they
24 used the RQC in the production environment and the RSS
25 is gone.

1 There will be no testimony, no testimony,
2 that any RSS -- that there are any RSS customers of
3 Lawson, that any Lawson customer who was in any way
4 involved in this case is running RSS. That's not
5 going to be presented to Your Honor.

6 Any implication to the contrary is simply
7 inaccurate. And there are a host of inaccuracies and
8 out of context statements that relate to our factual
9 conduct, Lawson's factual conduct. We will present
10 evidence. We will meet that. I'm not saying don't
11 pay attention to that. I'm saying listen to the
12 evidence on that.

13 I want to focus today in the time allotted
14 for opening statement on what we consider to be the
15 critical, single issue for phase 1 of this proceeding
16 recognizing that there are more than one phase that
17 can occur in such proceedings.

18 Phase 1 is about whether the two-part change
19 made to the functionality of Punchout renders the
20 modified Configurations 3 and 5 more than colorably
21 different from the infringing configurations.

22 THE COURT: Do you have books with your
23 opening statements?

24 MR. THOMASCH: Yes, Your Honor. We handed
25 one to plaintiff's counsel. Would Your Honor like

1 one?

2 THE COURT: Yes.

3 MR. THOMASCH: I have very few slides, I'm
4 pleased to say.

5 So the phrase "more than colorably different"
6 is one that you've heard about throughout this case
7 and we've discussed and you're very familiar with.
8 The TiVo case, which is the guiding light from the
9 Federal Circuit on how to deal with civil contempt in
10 a patent law context with a redesigned product, TiVo
11 expressly equates more than colorable with
12 significant. That's the word that's used throughout
13 the TiVo case. Both sides have used that word. I
14 don't think there's any fair dispute there.

15 The question is how does one -- what does it
16 mean? How does one conduct an analysis about the
17 significance?

18 TiVo makes clear the significance analysis
19 requires an evaluation of the specific differences
20 between the original and the modified products. That
21 is critical language. I have it up on the monitor.
22 This is out of TiVo at page 884 of the decision.

23 For the record, it says, "The colorable
24 differences analysis should be based on the Court's
25 independent evaluation of specific differences between

1 the original and the modified products."

2 The Court went on to deal with how that would
3 play out in the TiVo case itself and said, "Here the
4 Court must compare the newly developed statistical
5 estimation feature with the original start code
6 detection feature to determine if the difference
7 between the two is significant. Not the difference
8 between the entire products. The difference between
9 the original and the modified features that are at
10 issue in the hearing.

11 So that takes me to what exactly is the
12 modification in this case? Let's at least understand
13 what changed between the infringing configurations and
14 the configurations that are now the subject of this
15 contempt proceeding.

16 And Mr. Strapp mentioned very briefly that it
17 related to how things are organized on a requisition.
18 I'd like to be a little more specific because this is
19 important. These are changes to source code of
20 computer software. The source code is contained in
21 the RSS module, which is sort of the nerve center and
22 commands, directs the functionality of other aspects
23 of the overall configuration.

24 THE COURT: Does it make any difference what
25 the change to the source code is as much as -- what

1 really makes a difference is what's the functionality.

2 MR. THOMASCH: I would agree 100 percent,
3 Your Honor. What I was just simply saying is it
4 doesn't matter that it's a change to the source code
5 or in what module the source code is, the
6 functionality, and it's a big issue here, and you're
7 going to see, and I'll talk about it a littler later,
8 but the change is in the functionality of the Punchout
9 and how it relates to item master. It's not a change
10 in other aspects of RSS that were at issue previously
11 in this case.

12 So there's a two-part change here, Your
13 Honor. The first part, and I want to go through it
14 slowly so that we understand what is actually at
15 issue. What was the specific change in the words of
16 TiVo.

17 So part 1, when using the modified products,
18 a Lawson customer who has searched for and selected a
19 matching item or items from item master cannot access
20 a Punchout vendor's website during that shopping
21 session.

22 So if you've started with item master and you
23 have selected an item, you bring it back and it gets
24 put directly onto a requisition in the RQC module.
25 Once you do that, you can't get access to a Punchout

1 vendor's website. You can't look and see is there a
2 comparison product that I would like to buy. Can I
3 find this at a better price? You're unable to even
4 get to the website after you have put an item master
5 item on the requisition.

6 Now, similarly, if a shopping session starts
7 with a search and selection of one or more items from
8 Punchout, if you have an item from a Punchout vendor's
9 website, the customer cannot then access the item
10 master. So it works in both ways.

11 Once you have made a selection from one, you
12 can't even get into the other to look and see if
13 there's a better selection, much less can you see is
14 there an additional selection.

15 Thus, the redesigned product prevents a user
16 from searching and combining items from both item
17 master and a Punchout vendor's website on a single
18 requisition.

19 Now, it is not disputed that functionality
20 was a feature in the infringing configurations. You
21 had that functionality. Now you don't.

22 The second part of the change is a variation
23 on that theme, but it sort of completes the loop
24 between the interaction of Punchout and item master.
25 Your Honor will recall from the trial, item master, a

1 big database with potentially thousands of items in
2 it. Punchout, separate websites for different
3 Punchout vendors. So you can go to this specially
4 designed Dell website or specially designed Staples
5 website. Or there could be 100 different Punchout
6 vendors that a Lawson customer has.

7 Well, when using the modified products, a
8 Lawson customer who has searched and selected an item
9 from one Punchout vendor's website cannot access a
10 second Punchout vendor's website. And, thus, you
11 can't go -- you can't look at something from Company
12 A, bring it back to your requisition, and then say,
13 Maybe I can get a better buy at Company B. Let me go
14 see what they have in this good. Well, that's not
15 available. You can't get to Company B's Punchout
16 site.

17 So the redesigned product prevents the user
18 from selecting and combining items from different
19 Punchout vendors' websites on a single requisition.
20 And, again, Your Honor, that is functionality that
21 concededly was present in the infringing products.
22 These changes in functionality are facts. They are
23 not in dispute. And it's also clear that the
24 functionality change is entirely to the detriment of
25 the product.

1 This product has been impaired. It is not as
2 good as it used to be. There is no corresponding
3 benefit. And Your Honor remembers there were other
4 aspects of this case in regard to the question about
5 whether there's a shopping cart and an order list or
6 whether you could go directly to a requisition. Much
7 time and discovery and argument was had about that
8 change. No longer at issue.

9 But there in that context, Lawson came up
10 with what I would call an elegant design around where
11 they accomplished what they wanted to do on a
12 design-around basis and they didn't impair
13 functionality. They did it a different way, but they
14 didn't impair functionality. And that was sort of
15 used against us.

16 This is different. We impaired it. We
17 couldn't do with Punchout what we had done with the
18 shopping cart. The only way to address the injunction
19 was to put a clever to the product and make it
20 different than it was. So the Punchout works
21 differently. These changes are significant. They are
22 more than colorable. They are absolutely significant.
23 And there's three ways I want to stress right at the
24 start as to why they are significant.

25 One, by restricting access after an item is

1 selected from either item master or a Punchout
2 vendor's website, RQC diminishes the ability that RSS
3 Punchout users had had to conveniently engage in
4 comparison shopping.

5 This product is not used by Your Honor or
6 your law clerk or me or Mr. Strapp. That is not the
7 customer. This is not for someone that occasionally
8 goes to Amazon and orders a book and then might want
9 to see, oh, can I go to Barnes & Noble and get a
10 better book?

11 This is used by requisition professionals
12 whose job it is to go to work and buy product for big
13 organizations and who are consistently buying lots of
14 things. And comparison shopping is a big part of
15 their job. And the old product allowed it,
16 facilitated it, made it convenient. The new product
17 prevents it.

18 Secondly, by preventing you from being able
19 to group things on a single requisition and do
20 multiple shopping excursions in one shopping session,
21 it now takes more time for the user to procure goods
22 from multiple sources. Time is money.

23 Third, you prolong and complicate the
24 requisition approval process. So Your Honor will
25 recall from the trial, the front line user of this

1 product in the first instance who actually does the
2 searches, finds the matching items, builds the
3 requisition, that's someone who is a requisitioner
4 purchasing professional. That person, however,
5 typically wants to generate a purchase order to go out
6 and, of course, commit his or her organization to pay
7 money. There's usually an approval process between
8 creating the requisition and actually sending out the
9 purchase order.

10 So someone has to approve the requisitions.
11 Under the old system, if an individual requisitioner
12 was buying items from 15 places and 150 items total,
13 they all were back on one requisition and the party
14 that was doing the approval could look at the whole
15 thing, the array of goods being purchased and say,
16 okay, I approve or I disapprove. Now that party has
17 10 different requisitions to approve and the time
18 involved and, of course, when they are approving the
19 first, they don't even know what the tenth one says.
20 So it's a different world altogether and more
21 complicated both at the front end and at the back end
22 of the process by which these machines are used in the
23 real world.

24 Lawson did not want to make these
25 modifications. I want to be clear about that.

1 There's no advantage to Lawson. There was one reason
2 and one reason only that these were made. Because of
3 the injunction and Lawson's respect for this Court and
4 for the injunction, it made the changes. And you will
5 see evidence that, for instance, as of the time of the
6 March 25th hearing in this court, there was not even a
7 clue as to how Lawson would deal with Punchout. They
8 didn't know what to do because they were still trying
9 to figure out is there a way in which we can do this
10 without impairing our customers' ability to use it.
11 Can we do it without a loss of functionality? And
12 they came up with a couple of ideas and it didn't
13 work. The lawyers said, That's not good enough.

14 So they had nothing at that point. And the
15 documents say, Well, what are we going to do about
16 that because we have deals that are closing? And they
17 said, Well, if we have a redesigned RSS, and what that
18 really means is this order list of direct requisition,
19 that whole user interface other aspect of the case
20 that you heard about where the shopping cart existed,
21 and then it was replaced, it was eliminated and it was
22 replaced by direct requisition technique, they said,
23 If that redesign is going to work, if we can get
24 something there, this was done in mid April, if we can
25 get something there we'll sell that to the customer

1 instead of RSS and we will put Punchout out of the
2 deal. In other words, we can't sell them Punchout
3 because Punchout is still not changed. It hasn't --
4 we haven't got a design around. So we'll pull it out
5 of the deal. That would have had an adverse
6 consequence on Lawson.

7 As it turned out, Lawson came up with an idea
8 that was better than pulling it out. It was cutting
9 off much of the functionality so that functionality
10 that was necessary wasn't there.

11 What we will talk about during this trial is
12 what we like to call the delta between the
13 functionality of the infringing configuration, which
14 is the greater functionality, and the lesser
15 functionality of the modified configurations, and we
16 will try to isolate and focus on that delta with each
17 witness because that's what TiVo said.

18 Look at the significance of the specific
19 differences. And that's what we intend to do. TiVo
20 directs us to do that. EPlus isn't going about this
21 case that way. They are not talking about
22 colorability in that light. They offer little or no
23 evidence or argument that directly addresses the
24 comparison of the feature that existed and the feature
25 as it is changed. And that's the TiVo analysis.

1 Now, I know it seems preposterous to say
2 after all that we've been through in this case that
3 they have no evidence on the central point for the
4 phase 1 proceeding, but that is the case. They have
5 talked about these as cosmetic and aesthetic changes.
6 They are not. They are real world changes that impair
7 the functionality.

8 They use those terms a lot with other aspects
9 of the redesign. We had whole different arguments
10 that are never going to be brought before the Court.
11 But we had good arguments.

12 But in this situation there's nothing
13 aesthetic or cosmetic about what's at issue. There
14 are changes. They are real. They are undisputed.
15 And it's up to the Court to evaluate the significance
16 of them.

17 Let's go to slide 5, please. Consistent with
18 what ePlus put in it pretrial statements, Mr. Strapp's
19 opening statement didn't make reference to the kind of
20 evidence that you would expect to see from a party
21 that bears the burden of proof if they were going to
22 be able to show that the differences were not
23 significant.

24 First, in this case, there will be nothing to
25 dispute the fact that the modifications were made to

1 the infringing components and that the loss of
2 functionality is real.

3 Second, there is not going to be any
4 testimony by a Lawson witness that the modifications
5 that are now at issue are insignificant. That just --
6 there isn't such testimony.

7 THE COURT: Is there a difference between
8 insignificant in the generic sense of the word and
9 insignificant in the assessment and application of the
10 test under TiVo?

11 MR. THOMASCH: I think that word actually
12 is -- I could see that one could bandy about
13 significance or insignificance in a way that wasn't
14 directly related to TiVo, but I think TiVo said the
15 test is whether something is more than colorably
16 different. And then you had to look at whether it was
17 significant. And I think significance relates to in
18 this instance the functionality that the product was
19 designed to have.

20 THE COURT: But they say that their argument
21 is that if you do a degradation of the product, which
22 you said you've done, then that's an indication that
23 it is not significant because it is not an innovation
24 or under the TiVo meaning of significance, you don't
25 pass muster.

1 MR. THOMASCH: Right. And that's simply
2 wrong. And that's a legal issue for Your Honor.

3 THE COURT: You're saying that's a legal
4 question.

5 MR. THOMASCH: It's a legal question. It's a
6 legal question. There's no doubt. We're not trying
7 to claim that this was innovative. It wouldn't have
8 been innovative if we had simply said, Don't sell
9 Punchout. But if we didn't sell Punchout, we wouldn't
10 be alleged to be infringing Claim 26.

11 So the notion here that somehow if it's not
12 innovative -- the Court in TiVo said if it is
13 innovative, there could be some relevance to that. It
14 didn't say what would happen if it's not innovative.
15 TiVo itself involved a step backwards.

16 There is no doubt that TiVo was a loss of
17 functionality case, and the Court didn't say, Oh, you
18 have a loss of functionality. Then you are not more
19 than colorably different.

20 The Court sent it back to say we have to
21 compare the difference between the old and the new
22 feature.

23 THE COURT: What happened on the send back?

24 MR. THOMASCH: I don't believe it ultimately
25 was resolved, Your Honor. To my knowledge that

1 case -- I believe that case settled. And I could be
2 mistaken. I certainly am confident that there aren't
3 published opinions after that. I think I have drawn
4 that conclusion that it settled. But I don't have
5 firsthand knowledge of that and wasn't involved in the
6 case.

7 So ePlus doesn't have testimony by Lawson
8 witnesses about this difference, okay. What they aim
9 at -- there were lost of depositions of Lawson
10 customers. And what they're asked about are all the
11 things that didn't change and whether you can still do
12 things with the product that you could have done
13 before. They never focus on the actual difference and
14 on this things that you can't do. And that's where
15 TiVo takes the testimony. It takes the analysis.

16 They are not going to call any Lawson
17 witness. We will both come forward with some evidence
18 about what Lawson witnesses -- Lawson customers -- I'm
19 sorry. They are not --

20 THE COURT: They are not going to call any
21 Lawson witnesses?

22 MR. THOMASCH: I misspoke, Your Honor. I
23 misspoke and I apologize.

24 They are not going to call any Lawson
25 customers. And there are customers within the

1 subpoena power of the Court that they could have
2 called. They have a list of our customers. This case
3 started at one time with approximately 2000 customers
4 who had systems accused of being infringing.

5 As of the time that there was an injunction,
6 there were 864 of them. And I believe 137, and I
7 could be off by one or two, but I think 137 of those
8 864 had Configurations 3 and 5. This deals with, this
9 Configuration 3 and 5 is identical -- well,
10 Configuration 3 is identical to Configuration 2, which
11 is not in the case but for the addition of Punchout.

12 Punchout is about 10 percent of our customer
13 base. It doesn't drive the sales. It isn't the big
14 product. The big product, Configuration 1, which
15 gives you the real sophisticated, all the underlying
16 guts. Configuration 2, which gives you that and RSS,
17 which is that sort of user-friendly interface that
18 allows you to with minimal training be able to do what
19 Configuration 1 can do.

20 They have the same ability to do things, but
21 it's easier to do them on Configuration 2. It's not
22 relevant for patent purposes, but in the real world
23 marketplace, it's relevant to have RSS or RQC because
24 it helps someone who is used to operating on a
25 computer terminal do sort of point and click.

1 So those two accounted for 17 or 1800 of the
2 customers. And there was a Configuration 4 that had
3 some customers and it's not in this case. We're left
4 with a very small group of customers who the reason
5 they have 3 -- the difference between having 3 and
6 having 2, I can still do everything that I could do
7 with 2. In addition I have an added benefit. I can
8 do a search with Punchout and item master or Punchout
9 alone. And that's what we've changed.

10 Finally, there isn't going to be -- you heard
11 about Dr. Weaver. There is not going to be an expert
12 opinion in this case from the plaintiffs that the
13 modifications are insignificant. He is not going to
14 testify that they are insignificant independent of the
15 alleged infringement. And that's a big issue. And
16 I'll talk about that in a little bit.

17 If we could go to the next slide, I want to
18 talk about the arguments they are making and not the
19 evidence that they didn't make. I want to go through
20 quickly, but to argue that the modifications concern
21 random features not relied on. Well, there is nothing
22 random about what we changed. What we changed was the
23 functionality that was at the epicenter of the first
24 trial.

25 THE COURT: Leave random out of it. Leave

1 the modifier "random" out of it.

2 MR. THOMASCH: Understood.

3 Your Honor, there is -- we would agree on a
4 point that there's a threshold question whether you
5 could make a change to -- the TiVo case says a random
6 feature. You could make a change that is unrelated to
7 the evidence that came in at trial. And that got us
8 into the whole contended and proved issue. And if you
9 made a change to that, it wouldn't matter. It has to
10 be to something that was contended and proved to be
11 part of the case. Now, here --

12 THE COURT: It has to be something that is an
13 element of the claim.

14 MR. THOMASCH: That relates to an element of
15 the claim. It identifies what differences you take
16 evidence about. We are sort of past that point and we
17 went through lots of letters, and we didn't have sort
18 of identification, but we did say, Here are the three
19 changes. And we've identified the changes. And now
20 we're down to the changes that relate to Punchout for
21 Configurations 3 and 5. So that argument, in effect,
22 is a legal argument for the Court to decide what is
23 relevant or not, and it's something that normally you
24 would deal before you got here. We're here and we
25 know what we're talking about.

1 Number 2 is they spent a lot of time talking
2 about the significance of unchanged features of the
3 infringing configurations. And you heard Punchout
4 didn't change. Well, the functionality of Punchout
5 changed. The system flow didn't change. The base
6 didn't change. It's absolutely right. There are lots
7 of parts of it that didn't change.

8 TiVo says, Look at what did change. See if
9 what did change is significant. I talked about the
10 question whether the changes are in the Punchout
11 module or in RSS. What's important about that is that
12 the witness -- you'll see RSS is the user interface
13 that's on every configuration that was found
14 infringing. All 864. That was -- there were separate
15 issues there on the way in which the RSS operated
16 behind the screen. The way in which it processed your
17 order.

18 Did it go into a temporary shopping cart and
19 then from there to a requisition? And we made a
20 change to go directly to a requisition. And there's
21 been a lot of briefing on that.

22 But it was a point of pride to Lawson that we
23 did that. And we eliminated something that was
24 critical to the patent, but we did it in a way that
25 was of no loss of functionality to our customers

1 whatsoever. And on that issue, which is not the part
2 of this trial, but is the part of our document base,
3 it is the part of our development story, it is a real
4 thing.

5 In that situation, we were proud of the fact
6 that we didn't impair functionality at all. We did it
7 in an elegant way that eliminated the shopping cart
8 but allowed the user who used to be able to know how
9 to use RSS to be able to use RQC easily.

10 That's not what this is about. And when they
11 point to documents that talk about RSS and RQC are
12 similar, the same, no big change, if you know how to
13 do one, you can do the other, that's talking about the
14 user interface and the direct to requisition.

15 There's no testimony, they didn't take those
16 documents, show it to the witness and say, Were you
17 talking about Punchout and get an affirmative
18 response. Those are not Punchout-related documents.
19 They don't relate to Configurations 3 and 5. They
20 largely relate to the common aspect of 2, 3 and 5,
21 every one of the 864 customers who had the shopping
22 cart.

23 They will -- finally, they will argue that
24 the modified product still infringes the claims at
25 issue. And I think this is the conflation point

1 that's so central, and I want to show you exactly how
2 it comes up because they are going to argue
3 colorability and the lack of significance here, and we
4 had expert reports, and there's been, again, much
5 motion practice and decision on expert reports. But
6 if there's one thing that's been clear it's that if
7 you want to say something in court, it has to be in
8 your expert report.

9 And we then took depositions based on the
10 expert reports. And I deposed Dr. Weaver. And the
11 deposition testimony I want to refer to is the
12 specific section that was addressed to what the basis
13 was for his claim that the changes were not more than
14 colorable because that's the opinion he expressed.

15 And for the record, I asked him question:
16 Did you also form an opinion as to whether the changes
17 that were made were more than merely colorable? And I
18 will note away from the quote, that this was
19 specifically in regard to the two Punchout-related
20 changes that I mentioned to the Court. That's the
21 section of this deposition that I'm now excerpting
22 from.

23 The answer: Yes, I am of the opinion that
24 they are not more than colorably different.

25 Question: Okay. Then what is the basis for

1 that opinion?

2 Answer: Because the functionality of RQC
3 even with the reconfigured Punchout still has the
4 functionality of the '683 claims.

5 And then I followed up, question: So by
6 saying you have the functionality of the '683 claims,
7 you're saying that you infringe the '683 claims?

8 Answer: Yes.

9 Question: And on that basis, you have the
10 personal opinion that changes made to Punchout are not
11 more than colorably different?

12 Answer: That's correct.

13 Dr. Weaver's testimony was unambiguous and
14 his two expert reports totaling 135 plus pages are
15 absolutely consistent with this. He does not say, I
16 am comparing the features, the functionality of the
17 infringing Punchout in the overall system with the
18 same aspects as modified and looking to see whether
19 the difference between the original and the modified
20 is significant. He doesn't do that.

21 The comparison for Dr. Weaver is not the TiVo
22 comparison between infringing and modified. It's
23 between modified and patent claims. And he says, If
24 the modified still infringes, it's not more than
25 colorable. That puts stage 2 in front of stage 1.

1 And the Federal Circuit has made it clear that is
2 incorrect.

3 Indeed, the Federal Circuit in TiVo made new
4 law. It rejected and overruled the KSR case. It said
5 what it called the infringement based understanding of
6 the colorable differences test was being overruled.
7 That's at TiVo at 646 F.3d 869 page 882. They
8 overruled the infringement based understanding of the
9 colorability difference test. That's what Dr. Weaver
10 did. Dr. Weaver gave an opinion that's consistent
11 with KSR --

12 THE COURT: Are you saying in all of his
13 report, Dr. Weaver didn't take a look at the modified
14 product with the elements and match them to the
15 elements of Claim 26?

16 MR. THOMASCH: No, I am not saying that.

17 THE COURT: Because that's what he's supposed
18 to do. And if he did that, that's fine.

19 MR. THOMASCH: Your Honor, what he did --

20 THE COURT: I think -- I have to tell you --
21 okay. I just want to make sure I understand. You're
22 saying he didn't do that.

23 MR. THOMASCH: I want to be clear what he
24 didn't do. What he didn't do was compare the
25 functionality of the infringing configuration and the

1 functionality of the modified configuration. He did
2 not look at those two and say, "Is this significant?"

3 TiVo says that if that difference is
4 significant, you never reach the question of
5 infringement. What he did was he looked at the -- he
6 compared the modified product and the patent claims
7 and said it still infringes. And because it still
8 infringes, I believe it's not more than colorable.

9 He has two reports. He does not offer any
10 opinion or any basis that a comparison of the feature
11 of the infringing product and the feature of the
12 modified product are not significantly different. He
13 doesn't say so. He will not say so in this court
14 unless he offers testimony beyond the scope of his
15 report, which I don't believe will be allowed.

16 The quoted testimony was not an accident or a
17 slip of tongue or something taken out of context.
18 This is consistent with his report. And the reason,
19 Your Honor, the reason we submit that in 130 plus
20 pages of expert reports Dr. Weaver never says that the
21 change in functionality between what was on trial
22 before and what is now at issue, the reason he doesn't
23 say that that's not significant is because he has
24 previously said it is significant.

25 He previously identified that capacity as, "A

1 big deal." This was something -- this was a feature
2 of centrality and importance to Dr. Weaver. If it is
3 a big deal to have it, it's a big deal to lose it.
4 That's our position, Your Honor.

5 Now, ePlus has a very heavy burden of proof
6 in this contempt proceeding as Your Honor is aware,
7 and we could simply rest on their failure to address
8 the TiVo issue that I had forth on the first slide.
9 That is our position. We are going to isolate that
10 difference between the products and talk about whether
11 they are different product to you product, feature to
12 feature. Original infringing and modified and
13 accused. Whether that difference is significant.

14 And they don't do that. And we could just
15 say fine. We're ships passing in the night. Put your
16 evidence in. We'll make our legal argument.

17 We don't have a reason or a need or a burden
18 to affirmatively come forward with evidence. They
19 have a clear and convincing burden. And if they don't
20 address the central question that TiVo dictates, then
21 they cannot carry that burden, at least in our
22 position, and we're not going to change that position.

23 THE COURT: So you're not putting on any
24 evidence?

25 MR. THOMASCH: But we will put on evidence.

1 We don't have to, but we will. We will put on
2 evidence and we will show because we want to answer
3 the Court's questions, we want to deal with this. And
4 so, yes, we are going to put on that. But we are
5 going to try in the course of that presentation to
6 keep coming back to the test that TiVo says and not
7 the distractions that have been used time and again.

8 You will see in that evidence that Lawson's
9 business managers did not want to make either part of
10 the two-part change that ultimately was made, but the
11 lawyers who had the final say said it had to be done
12 in order to conform with the injunction.

13 That evidence is going to come in through the
14 testimony of Mr. Christopherson and Mr. Lohkamp, who
15 will be in court. It has already come in through the
16 testimony of Mr. Hager and his deposition has been
17 submitted and is available for the Court, and it will
18 be reflected in documents that Dr. Weaver reviewed but
19 did not comment on in his expert report.

20 Unless ePlus can show that the differences
21 are not substantial, they should not be permitted to
22 continue this case. They have a right to say that the
23 analysis they want to engage in is the modified
24 product still within the claims of the patent. They
25 want to the argue that. They want to say we're in

1 patent infringement.

2 I want to be clear. If we win this case, if
3 we win on colorability, that doesn't end our potential
4 liability in any way, shape or form. They can sue us
5 for patent infringement for prior conduct for the cost
6 of a civil action number. That is their entitlement.

7 What they are not free to do is to try to
8 prove infringement in a new case with no new claim
9 construction, with no jury, with new theories, with a
10 new way of saying that we infringe. They are not free
11 to do that when the product they're talking about is
12 significantly different than the product that already
13 has been found to be infringing. That's the issue in
14 this case.

15 It's isn't fair or proper to have that form
16 of infringement analysis when the underlying product
17 has been significantly changed. TiVo says so. TiVo
18 says that issue is not relevant at that point.

19 Configurations 3 and 5 containing the new RQC
20 and the limitations on how RQC interacts with Punchout
21 are more than colorable different from Configurations
22 3 and 5 containing RSS. The evidence will show that.
23 We will ask the Court to constantly focus on whether
24 what is being discussed is in fact a comparison of the
25 differences.

1 That is what TiVo says the case should be.
2 That is the case we will try to victory or to defeat.
3 That is our case. And we think that the evidence only
4 permits one conclusion. There isn't another
5 reasonable side. This is functionality. This is not
6 lipstick on a pig. This is not cosmetic. It's not
7 nomenclature. It's not labeling. It's real life
8 functionality that diminishes the ability of the user
9 of the product to do what Configuration 3 and
10 Configuration 5 are intended to do to the extent that
11 the customer wants to use that separate functionality,
12 which is necessary for Claim 26.

13 Remember, Configuration 2, which is just like
14 3 but doesn't have Punchout, Configuration 2 wasn't
15 even accused of infringing Claim 26. And
16 Configuration 4, which had EDI in it, was accused of
17 infringing Claim 26, but the jury rejected that.

18 So the only -- where you have this cased all
19 shaping up is they know that you need Punchout in
20 order to be relevant to Claim 26. We're in agreement
21 on that. It's Punchout as it's used in the system.
22 It's not just about Punchout. But it's the Punchout
23 functionality that's necessary because if you don't
24 have Punchout functionality, they don't even accuse us
25 of infringing Claim 26.

1 The Punchout functionality is what we are
2 going to be talking about. We changed the product.
3 We changed it any a big way. It is a big deal in the
4 words of Dr. Weaver. And at the end of this phase of
5 the case, we will ask Your Honor for judgment as a
6 matter of law and a termination of the proceeding at
7 least with respect to the questions that concern RQC.

8 Thank you, Your Honor.

9 THE COURT: We are going to take a recess and
10 change court reporters in just one second, but we
11 started roughly an hour and a half ago, and the reason
12 we're doing the order of proceedings and order of
13 March as we are, which is to take up the proofs
14 respecting the contempt, is that we don't have any
15 proofs being offered on the issue of the injunction.
16 That's only going to be legal argument. And you-all
17 set your witnesses and the availability of your
18 experts and the availability of the lawyers around a
19 date that was picked sometime ago. And I'm going on
20 and take that testimony. But I would like to make
21 sure we get the witnesses' testimony in given that we
22 have structured the whole order of proceedings in
23 order that we make sure we do get the testimony in.
24 We'll take a 20-minutes recess.

25 (Recess taken at 10:55 AM.)

1 THE COURT: Call your first witness, please.

2 MS. ALBERT: Yes, Your Honor. ePlus calls Dr.
3 Alfred Weaver.

4

5

ALFRED C. WEAVER,

6 a witness, called at the instance of the plaintiff,
7 having been first duly sworn, testified as follows:

8

DIRECT EXAMINATION

9

BY MS. ALBERT:

10 Q Good morning, Dr. Weaver.

11 A Good morning.

12 Q Would you state your full name for the record.

13 A Alfred C. Weaver.

14 Q Would you tell us your current occupation.

15 A I'm a professor of computer science at the University
16 of Virginia, and I'm director of the university's Applied
17 Research Institute.

18 Q What are your fields of expertise?

19 A Computer science, computer systems, computer network
20 architecture, databases, internet, and electronic
21 commerce.

22 Q Were you previously qualified as an expert in this
23 case by the Court during trial?

24 A Yes, I was.

25 MS. ALBERT: Your Honor, I would proffer Dr.

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1 Weaver as an expert in the field of computer science,
2 computer systems, networks, databases, and internet and
3 electronic commerce.

4 THE COURT: Any objection?

5 MR. THOMASCH: No objection, Your Honor.

6 THE COURT: He is so qualified.

7 Q Dr. Weaver, what issues were you asked to analyze for
8 purposes of this proceeding?

9 A I was asked to analyze two issues: One, whether or
10 not the changes that have been made in the -- to RSS to
11 produce RQC are more than colorably different -- let me
12 say that again. Whether the systems now, the procurement
13 system using RQC is more than colorably different from the
14 systems that were adjudged to infringe in the previous
15 trial, and then secondly, whether or not the RQC system
16 coupled with the S3 procurement system continues to
17 infringe claim 26.

18 Q What is the Requisition Center or RQC application?

19 A This is a software module that overlays the
20 procurement system, and it provides friendly user
21 interface to the procurement system.

22 Q What materials did you review and rely upon in order
23 to render your opinions in this proceeding?

24 A There were lots of documents produced by Lawson during
25 the --

1 THE COURT: Excuse me a minute. I thought you
2 took the view that claim 26 was a method claim.

3 MS. ALBERT: Claim 26 is a method claim.

4 THE COURT: Why is he talking about a system
5 then?

6 MS. ALBERT: The system is used to perform the
7 method.

8 THE COURT: I assume you'll cover that with him.

9 MS. ALBERT: Yes, Your Honor.

10 THE COURT: All right.

11 A Okay, so I reviewed documents that Lawson produced
12 during discovery. I read the testimony of their experts.
13 I reviewed some of the webinars about training for RQC.
14 Lawson provided a demonstration system that ran RQC and
15 RSS on the same computer. I made experiments with that
16 and developed some demonstrations that we might see later.
17 I spoke with ePlus's other expert, Patrick Niemeyer, about
18 the source code.

19 Q Did you review the deposition of Lawson's technical
20 witness, Mr. Christopherson?

21 A Yes, I did.

22 Q Did you review the depositions of Lawson's other
23 corporate representatives, Ms. Homewood and Mr. Hansen?

24 A Yes, I did.

25 Q Did you review the depositions of Lawson's other

1 witnesses, Mr. Lohkamp and Mr. Hager?

2 A Yes, I did.

3 Q Did you review any technical manuals that Lawson
4 produced relating to the systems having Requisition
5 Center?

6 A Yes, I did.

7 Q Did you review, for example, the Lawson Requisition
8 Center user guide?

9 A Yes, I did.

10 Q Did you review Lawson's inventory control user guide?

11 A Yes, I did.

12 Q Did you review Lawson's Procurement Punchout
13 installation and administration guide?

14 A Yes, I did.

15 Q Are these technical guides the types of documents that
16 experts in your field would find relevant to understanding
17 the operation of the Lawson systems?

18 A Yes, they are.

19 Q Did you review declarations, written testimony that
20 was submitted by Lawson's witnesses, Mr. Christopherson,
21 Mr. Dooner, and Dr. Shamos in opposition to ePlus's motion
22 to show cause why Lawson should not be held in contempt of
23 the Court's injunction?

24 A Yes, I've read all three.

25 Q Did you have the opportunity to review the report of

1 Lawson's technical expert, Dr. Goldberg?

2 A Yes, I did.

3 Q Did you have the opportunity to review communications
4 that Lawson issued to its customers concerning the
5 functionality of the Requisition Center application?

6 A Yes, I did.

7 Q Did you review any internal communications within
8 Lawson with respect to the functionality of the
9 Requisition Center application?

10 A Yes, I did.

11 Q Now, these types of documents that we've been talking
12 about, the technical manuals, the user guides, the
13 customer communications, internal communications, training
14 courses, demonstration systems, webinars, are these the
15 types of documents that an expert in your field who is
16 going to be offering opinions on the functionality of a
17 computer software implemented process would reasonably
18 rely upon in forming opinions about the issues involved in
19 this contempt proceeding?

20 A Yes, they are.

21 Q And did all of these materials assist you in
22 formulating the opinions that you've rendered for purposes
23 of this contempt proceeding?

24 A Yes, they did.

25 Q For purposes of your analysis of the RQC systems and

1 the opinions that you are rendering here today, what do
2 you consider to be the appropriate level of ordinary skill
3 in the art?

4 A I think that would be a person who --

5 MR. THOMASCH: Objection, Your Honor. The issue
6 of ordinary skill in the art is relevant to infringement.
7 I do not believe that there's been any finding on the
8 issue of ordinary skill in the art is relevant to the
9 colorable differences test.

10 MS. ALBERT: I believe that the *TiVo* case does
11 indicate that when viewing the significance of a change to
12 the accused system, that you are to view that modification
13 in terms of the perspective of a person of ordinary skill
14 in the art. *TiVo* says at --

15 THE COURT: What page is it on?

16 MS. ALBERT: 646 F.3d, page 882, that the Court
17 must also look to the relevant prior art, if any is
18 available, to determine if the modification merely employs
19 or combines elements already known in the prior art in a
20 manner that would have been obvious to a person of
21 ordinary skill in the art at the time the modification was
22 made. A nonobvious modification may well result in a
23 finding of a more than colorable difference.

24 So here you see clearly that the context of the
25 colorable difference is to be viewed in the prism of the

1 person of ordinary skill in the art.

2 MR. THOMASCH: Your Honor, I think to the extent
3 that that is the issue that's being framed, a person of
4 ordinary skill in the art can comment. If there was a
5 question about whether, for instance, this was practicing
6 a prior art, I think that a person of ordinary skill in
7 the art standard would be appropriate, but if it's a
8 question of whether there's a significant difference in
9 the functionality, I don't think that that's necessarily
10 drawn, and I don't think *TiVo* indicates that that's
11 necessarily drawn from one of ordinary skill in the art or
12 which art would be relevant for the colorable differences
13 test in that regard.

14 THE COURT: Anything else?

15 MS. ALBERT: Pardon me?

16 THE COURT: Is there anything else?

17 MS. ALBERT: I mean my position is that we
18 believe that it is relevant --

19 THE COURT: I mean other than to repeat what
20 you've already said.

21 MS. ALBERT: No. I mean, I'm not going to repeat
22 what I already said.

23 THE COURT: That's what "anything else" means.
24 Overruled.

25 Q Do you consider yourself to be at least a person of

1 ordinary skill in the art?

2 A Yes.

3 THE COURT: He didn't answer the question.

4 MS. ALBERT: Pardon me?

5 THE COURT: He didn't answer the question because
6 there was an objection.

7 MS. ALBERT: I'm sorry. Let me go back.

8 Q For purposes of your analysis of the RQC systems and
9 the opinions that you are rendering here today, what do
10 you consider to be the appropriate level of a person of
11 ordinary skill in the art?

12 A I believe that person would have a Bachelor of Science
13 degree in computer science or a similar technical
14 discipline and one or two years of practical experience
15 writing code and working with supply chain management.

16 Q And are you a person of ordinary skill in the art?

17 A No. I'm an expert.

18 Q Thank you. Let's review, if we could, the Lawson
19 configurations that were found to be used to infringe the
20 method of claim 26 of the '683 patent. How many
21 configurations did the jury find were used to infringe
22 claim 26?

23 A Two; configurations three and five.

24 Q Let's look at configuration number three. What are
25 the components of configuration number three?

1 A At the bottom are the platform technology foundation
2 including Lawson System Foundation and process flow.
3 Above that, the S3 procurement modules which include
4 purchase order requisitions and inventory control. Above
5 that, requisition self service, and above that,
6 Procurement Punchout.

7 Q Now can we see configuration five, please. How does
8 configuration five differ from configuration number three?

9 A It adds the electronic data interchange module.

10 Q Let's briefly review claim 26 of the '683 patent at
11 issue in this proceeding. Could you briefly walk us
12 through the elements in that claim.

13 A This is a method claim that has six elements: First,
14 maintaining at least two product catalogs on a database
15 containing data relating to items associated with the
16 respective sources.

17 Second, selecting the product catalogs to search;
18 third, searching for matching items among the selected
19 product catalogs; fourth, building a requisition using
20 data relating to selected matching items and their
21 associated source or sources.

22 Fifth, processing the requisition to generate one or
23 more purchase orders for the selected matching items; and
24 sixth, determining whether a selected matching item is
25 available in inventory.

1 Q Now, in conducting your assessment of whether the
2 Lawson systems, which include the Requisition Center
3 application are more than colorably different from the
4 infringing configurations, did you review any evidence
5 concerning whether or not certain components and
6 functionality of the infringing configurations were
7 changed for purposes of the release of the Requisition
8 Center application?

9 A Yes, I did.

10 MS. ALBERT: Can we look at configurations three
11 and five.

12 Q Out of the all of the modules and applications
13 included in the infringing configurations, which modules
14 and applications have been modified?

15 A Only one, and that was requisition self service, RSS,
16 was modified to produce Requisition Center, RQC.

17 Q What functions are performed by the Requisition Center
18 application in the configurations having RQC?

19 A It provides a user interface and a view to the data
20 and functions in the S3 procurement modules.

21 Q After the jury's verdict, did Lawson make any
22 modifications to the underlying Lawson System Foundation
23 for purposes of the release of RQC?

24 MR. THOMASCH: Objection, Your Honor. There is
25 no dispute about that. We've been through that in

1 multiple court proceedings, and *TiVo* says that you do not
2 look to those aspects of the system that are unchanged but
3 focus only on those that are changed, and there is no
4 dispute between the parties as to what was not changed.
5 It's not relevant to this proceedings, we would suggest.

6 MS. ALBERT: Your Honor, Dr. Weaver's opinion as
7 to whether the change that's been brought by RQC renders
8 the configurations more than colorably different from the
9 infringing configurations takes into account the entire
10 functionality of the configuration that was found to
11 infringe, and I think you'll find from his testimony that
12 he does consider it to be significant that only a single
13 module was changed and that the change within that module
14 was also insignificant.

15 So this is part of his colorability analysis. He
16 considers the entire infringing configuration as a whole
17 versus the accused configuration as Mr. Thomasch said was
18 the test in his opening statement.

19 MR. THOMASCH: And that does join the legal
20 issue, Your Honor. *TiVo* specifically talked about how it
21 would play out in *TiVo*, and they would look at not the
22 entire systems, not the DV recorders but rather the
23 feature of the statistical estimation feature and the
24 original stark code detection feature. That was the
25 comparison. *TiVo* could not be plainer on the fact that

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1 unchanged elements do not enter into the analysis. The
2 analysis must focus on only that which is different.

3 MS. ALBERT: Part of Dr. Weaver's --

4 THE COURT: Wouldn't you agree that the
5 analysis -- that the ultimate decision focuses on what Mr.
6 Thomasch said, I take it, but your point is that in order
7 to get there and understand Dr. Weaver's testimony about
8 that aspect of the colorability analysis, it is helpful to
9 the trier of the fact to understand the extent to which,
10 vel non, there were changes otherwise in the infringing
11 system?

12 MS. ALBERT: That's correct, Your Honor.

13 THE COURT: Is that your point?

14 MS. ALBERT: That is correct.

15 THE COURT: With that limitation, the objection
16 is overruled.

17 MS. ALBERT: Thank you, Your Honor.

18 THE COURT: Now that they've agreed that there
19 isn't any difference, I think he doesn't need to go
20 through and prove there isn't any difference because
21 they've agreed there isn't any changes to that. He can
22 testify -- I mean there aren't any changes.

23 He can testify what is the significance in his
24 view of the failure to make the changes, to pursue the
25 theory you are pursuing. Do you agree?

1 MS. ALBERT: That's fine, Your Honor.

2 THE COURT: All right. You do stipulate there
3 are no changes to the other parts of it.

4 MR. THOMASCH: Correct, Your Honor. The code
5 changes were in RSS, and the code changes impact the way
6 RSS directs Punchout to operate, but the other modules
7 were not changed. It's not in dispute, and we believe
8 that all such testimony is actually irrelevant and takes
9 us away from the point that *TiVo* says.

10 MS. ALBERT: We believe that the testimony is
11 relevant because *TiVo* says you should not focus on
12 randomly chosen features that aren't relevant to the
13 features that were relied upon to prove infringement at
14 trial, and Dr. Weaver will briefly overview what aspects
15 of the modules perform specific functions that are
16 relevant to the claims and compare and contrast that with
17 the change that was made that he has opined is a randomly
18 chosen feature that's not significant for purposes of the
19 claim.

20 THE COURT: Overruled.

21 Q Now, Dr. Weaver, did Lawson make any changes to the
22 inventory control module that's in the blue block of the
23 diagram?

24 A They did not.

25 Q Do functions of the inventory control module in the

1 current systems with RQC remain the same as they were in
2 the infringing configurations?

3 MR. THOMASCH: Your Honor, I object. If I could
4 have a running objection to all matters that relate to
5 what didn't change and not interrupt counsel, I would be
6 happy to do that, or I'm happy to interject --

7 THE COURT: You can have that objection, but once
8 she gets off of that, you have -- if she ever comes back
9 to it, you have to renew it.

10 MR. THOMASCH: Fair enough.

11 THE COURT: For this series.

12 MR. THOMASCH: This series on this exhibit, we
13 object to those that relate to that part which we've
14 agreed is not changed.

15 THE COURT: Go ahead.

16 MS. ALBERT: Do I have a question pending?

17 THE COURT: The objection is overruled. What?

18 MS. ALBERT: I think there's a question pending
19 that Dr. Weaver has yet to answer.

20 THE COURT: Well, ask it again.

21 Q Do the functions of the inventory control module in
22 the current systems that have Requisition Center remain
23 the same as they were in the infringing configurations?

24 A They remain the same.

25 Q Was the item master of the inventory control module

1 modified for purposes of Lawson's release of Requisition
2 Center?

3 A It was not.

4 Q What functions relevant to claim 26 are performed
5 using the item master?

6 MR. THOMASCH: Objection, Your Honor. That, I do
7 very, is a very different question, and I do not believe
8 that this witness is an expert in a way that allows him to
9 say what is relevant to a claim.

10 This really is at this point a legal analysis of
11 relevance, and if, for instance, counsel is correct that
12 this is a randomly chosen feature, then we don't have a
13 defense.

14 If it's a randomly chosen feature, it isn't
15 eligible for consideration of insignificance. If it is,
16 and, of course, it's eligible to be considered as
17 significant, then at that point the witness is not in a
18 position to determine what is relevant and what is not
19 relevant.

20 That is entirely a threshold issue for the Court.
21 It was not brought to the Court's attention. There was no
22 motion made to exclude all evidence that relates to this
23 feature which is what they're trying to do. If it's
24 randomly chosen, then we don't get to talk about RSS and
25 Punchout. It's not randomly chosen, and then they can't

1 talk about the other things. Your Honor, that's what *TiVo*
2 says.

3 THE COURT: Ask the question again. Overruled.

4 Q What functions relevant to claim 26 are performed
5 using the item master?

6 A Item master is capable of maintaining multiple product
7 catalogs that then can be searched and can then be
8 selected, and from that items can be chosen for inclusion
9 in a requisition.

10 Q Did Lawson make any changes to the process used to
11 search for items by keywords in the catalogs stored in the
12 item master?

13 A They did not, so there's no changes to keyword search.

14 Q Did Lawson make any changes to the requisitions
15 program, RQ 10, that's used for building a requisition?

16 A They did not.

17 Q Can you tell me whether or not the current version of
18 the requisition's module still allows the user to build
19 and manage requisitions?

20 A Yes, it does.

21 Q Can you tell me whether or not the purchase order
22 module of the systems having Requisition Center is still
23 used to generate purchase orders necessary to fulfill
24 requisitions for items not found in stock?

25 A Yes, it works that way, and if we get to it, I'll show

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1 a demonstration of that.

2 Q Have you reviewed any Lawson documents indicating
3 whether or not this capability to generate purchase orders
4 from a requisition still exists in the current Lawson
5 systems having Requisition Center?

6 A Yes, I have.

7 MS. ALBERT: Can we look at Plaintiff's
8 Exhibit 1003. Just as a point of order, Your Honor, do
9 you want me to separately move each exhibit as I proceed,
10 or should I move --

11 THE COURT: Have you all sorted out the
12 objections to the exhibits? Have you agreed that these
13 exhibits can come in?

14 MS. ALBERT: I believe for this particular one,
15 there are no objections to this exhibit.

16 THE COURT: Well, move the admissions of them,
17 and if there's an objection, they'll make it. If not --
18 we haven't had a pretrial conference, so.

19 MS. ALBERT: Thank you, Your Honor.

20 THE COURT: I didn't know whether you all had
21 just agreed to it or not.

22 Q Now, referring to Plaintiff's Exhibit 1003, did you
23 review this exhibit in connection with your analysis?

24 A Yes, I did.

25 Q What is the exhibit?

1 A This is a brochure that Lawson produced to explain the
2 features and capabilities of the Lawson Requisition Center
3 and Punchout.

4 MS. ALBERT: Your Honor, I would move the
5 admission of Plaintiff's Exhibit 1003.

6 THE COURT: Any objection?

7 MR. THOMASCH: No objection, Your Honor, to 1003.

8 THE COURT: It's admitted.

9
10 (ePlus Exhibit 1003 admitted.)

11
12 Q Referring to the bottom of the first page of the
13 exhibit, do you see a series of bullet points on that page
14 indicating that, quote, with Lawson Requisition Center and
15 Procurement Punchout, you can, and then there's a series
16 of bullet points?

17 A Right, five bullet points.

18 Q What are some of the functions that can be conducted
19 by Lawson procurement systems which include the
20 Requisition Center and Punchout applications that are
21 relevant to the Court's analysis here?

22 A Let's start with the second bullet. Allow end users
23 such as internal requesters to search the item master and
24 choose from an approved selection of items at negotiated
25 prices.

1 Also the third bullet point, connect to an external
2 vendor-maintained website to browse and select items to
3 add to a requisition. And also the fifth bullet,
4 consolidate multiple types of products and services into a
5 single requisition.

6 Q How, if at all, is this discussion of the capabilities
7 of configurations having Requisition Center and
8 Procurement Punchout relevant to your analysis of whether
9 or not such configurations are more than colorably
10 different from the infringing configurations?

11 A This tells me that the Lawson procurement system, with
12 RQC, continues to have the functionalities that we
13 discussed at trial. The ability to search vendor catalogs
14 in the item master, the ability to punch out and select
15 items that the user can add to a requisition and the
16 ability to include multiple items from multiple vendors on
17 a single requisition.

18 Q Let's turn to page RQC 692 of the exhibit. Under the
19 heading key features and benefits, what does Lawson
20 indicate that users can do with Lawson Requisition Center
21 and Procurement Punchout under that first bullet?

22 A The first bullet says, create a single requisition for
23 stock, nonstock, and special order items as well as
24 services. Lawson procurement can then automatically
25 generate multiple purchase orders from that requisition.

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1 Q How, if at all, is this description of the
2 capabilities of Lawson procurement systems having
3 Requisition Center and Procurement Punchout relevant to
4 your analysis today?

5 MR. THOMASCH: Objection, Your Honor, to
6 relevance. Again, this doesn't relate to Punchout, it
7 does not relate to the change.

8 THE COURT: Overruled.

9 Q The procurement systems using RQC can create a single
10 requisition with multiple items from multiple vendors, and
11 then the purchase order module can generate multiple
12 purchase orders for items in a single requisition, and
13 this is the same functionality that the jury found to
14 infringe at trial.

15 MR. THOMASCH: Objection, Your Honor, to
16 testimony about what the jury found to infringe at trial,
17 and we've obviously had lots of discussions on that.

18 THE COURT: I don't think he can testify what the
19 jury found. I didn't let their expert, Dr.

20 What's-his-name, Goldberg, testify to that, and he can't
21 either, so would you like to reframe your question?

22 Objection sustained.

23 Q How, if at all, is this description of the
24 capabilities of the Lawson procurement systems having RQC
25 relevant to your analysis of whether those systems are

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1 more than colorably different from the infringing
2 configurations?

3 A Well, it tells me that the functionalities that were
4 adjudged to be infringed at trial with the procurement
5 system and RSS, those -- of those capabilities, this one
6 is talking about generating multiple purchase orders.
7 That element continues -- that functionality continues to
8 be present in the new Lawson procurement system using RQC.

9 Q Thank you. Let's have the system configurations
10 again.

11 THE COURT: I'm sorry, I just -- it's that time
12 of the year in Virginia, and those of you who aren't from
13 Virginia will soon find that out if you're here very long.

14 Q Was the electronic data interchange application
15 modified for purposes of Lawson's release of the
16 Requisition Center application?

17 A No, it was not.

18 Q Did you review any documents that confirmed whether or
19 not there were any changes made to the EDI application?

20 A Yes, I did.

21 Q Let's see, if we could, Plaintiff's Exhibit 1002.
22 What is this exhibit, Dr. Weaver?

23 A PX-1002 results from Lawson having conducted a webinar
24 about RQC, and in that webinar, the customers are allowed
25 to ask questions and Lawson responds with answers. And

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1 this is a printed list of the questions and answers that
2 resulted from that webinar about RQC.

3 Q And did you review and rely upon this exhibit for
4 purposes of your analysis?

5 A Yes, I did.

6 MS. ALBERT: Your Honor, I would move the
7 admission of Plaintiff's Exhibit 1002 into evidence.

8 THE COURT: Any objection?

9 MR. THOMASCH: Yes, Your Honor. No threshold
10 showing of relevance. I don't believe just because he's
11 reviewed it for purposes of his consideration it makes the
12 exhibit admissible. The counsel has not said what it's to
13 be used for.

14 MS. ALBERT: You did not proffer any objections
15 to this exhibit in the pretrial submission.

16 THE COURT: They didn't offer any objections to
17 it?

18 MS. ALBERT: No. There were no objections to
19 this exhibit.

20 MR. THOMASCH: Your Honor, we did actually object
21 to all exhibits that did not come in through a witness who
22 had knowledge of the exhibit. We don't believe it is a
23 proper way to put the exhibits in to simply show it to the
24 expert and say, did you review and did you rely on it.

25 If counsel wants to establish what in the exhibit

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1 is relevant to this proceeding, that might change our
2 position, but it is not an appropriate way --

3 THE COURT: So he did preserve his objection if
4 it was not put in through a witness with knowledge.

5 MR. THOMASCH: That is exactly what we said, Your
6 Honor, as to all exhibit that didn't have a sponsor with
7 knowledge.

8 THE COURT: Is that an authentication objection
9 or a relevance objection?

10 MR. THOMASCH: Your Honor, I think it's a more
11 general foundation. We do not --

12 THE COURT: It's a foundational question.

13 MR. THOMASCH: It is. We don't challenge the
14 authenticity of the document, but the use of the document
15 we do.

16 THE COURT: All right, foundation.

17 Q Did you review any depositions where Lawson witnesses
18 discussed this exhibit?

19 A Yes, I did.

20 Q And did those Lawson witnesses indicate what the
21 nature of the document was?

22 A Yes, that it was question and answers from a webinar.

23 Q And what was the webinar concerning?

24 A RQC.

25 THE COURT: Do you want to point him to some part

1 of the exhibit that he reviewed that has pertinence to his
2 opinion so that he can know whether he wants to object to
3 it further or not.

4 MR. THOMASCH: That is entirely correct. It's
5 not the document we're objecting to.

6 THE COURT: I understand. So she's going to do
7 that.

8 Q Let me go ahead and refer you to the page marked RQC
9 650, and do you see the third question from the top
10 asking, quote, what about EDI, how is it going to change?

11 A Yes, I do.

12 Q How did Lawson respond to that question?

13 MR. THOMASCH: Objection, Your Honor, again,
14 relevance. EDI did not change. It's not disputed.

15 THE COURT: I thought you had a running objection
16 to that.

17 MR. THOMASCH: I wasn't sure if she had -- she
18 did move off of it.

19 THE COURT: Well, she did. Overruled. Go ahead.

20 A The answer was, there are no product changes to EDI,
21 and your current setup will not be impacted.

22 MS. ALBERT: So, Your Honor, I would submit that
23 this exhibit is relevant to show that Lawson was
24 communicating to its customers that certain functionality
25 in the systems was not going to change or be impacted, so

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1 it's relevant to the significance of the change.

2 THE COURT: And you have the same objection to
3 that?

4 MR. THOMASCH: I do, Your Honor.

5 THE COURT: Overruled. It's admitted for that
6 purpose.

7 Q What capabilities of the EDI application are relevant
8 to claim 26?

9 MR. THOMASCH: Same objection on relevance, Your
10 Honor, of his comparing an unchanged feature to the
11 relevance of a patent claim.

12 THE COURT: Sustained. I mean overruled, excuse
13 me.

14 A As we discussed at trial, the electronic data
15 interchange module allows the Lawson system to send
16 purchase orders to a vendor, and then EDI is able to
17 receive purchase order acknowledgements and from that
18 produce a purchase order acknowledgment report in which we
19 can see whether or not a specific item that was ordered is
20 available in the vendor's inventory.

21 Q Was the Punchout application modified for purposes of
22 the release of Requisition Center?

23 A It was not.

24 Q And what are the functionalities of the Punchout
25 application?

1 A Punchout is a -- Punchout allows the user to connect
2 to a Lawson trading partner and to search that trading
3 partner's inventory and possibly select items to be
4 ordered and to bring them back into the Lawson requisition
5 and purchase order system.

6 Q Can users of the Lawson systems that have Requisition
7 Center continue to utilize the Punchout functionality to
8 connect to a Lawson Punchout trading partner catalog?

9 A Yes, they can.

10 Q Can a user of the system having the Requisition Center
11 and Punchout applications continue to search for items on
12 the Punchout trading partner catalog website?

13 A Yes, they can.

14 Q Can a user of the system having the Requisition Center
15 and Punchout applications select items out of a Punchout
16 catalog site to retrieve and place in the Requisition
17 Center user interface requisition lines section?

18 A Yes, they can.

19 Q Have you reviewed documents confirming whether or not
20 the Punchout functionality has been changed in the Lawson
21 procurement systems having Requisition Center?

22 A Yes, I have.

23 Q Let's look for, if we could, at Plaintiff's
24 Exhibit 1000. What is Plaintiff's Exhibit 1000?

25 A This is a manual that Lawson distributed following the

1 release of RQC with instructions on how to install and use
2 Punchout.

3 Q Did you review and rely upon this document for
4 purposes of your opinion?

5 A Yes, I did.

6 Q Can we see the page marked RQC 12. What is
7 illustrated on this page of the Punchout guide?

8 A As we saw previously at trial, this is the eight steps
9 that are required for Punchout to work, and the steps
10 cover getting connected to the Punchout partner and
11 retrieving items that are in the Punchout partner's
12 shopping cart and moving those to the Lawson requisition
13 line.

14 Q Can you tell me whether or not the steps of the
15 current Punchout process differ from those in the Punchout
16 process used in the infringing configurations.

17 A They do not differ.

18 MR. THOMASCH: Objection. Lack of foundation as
19 to the question. I believe that there needs to be a
20 predicate in the question as to whether this is an initial
21 search by a Punchout user or whether it's a search after
22 the Punchout user has already brought an item back from a
23 different Punchout. It depends -- the question presumes a
24 fact that's not stated in the question, and if it's a
25 question for a new search, I would withdraw my objection.

1 THE COURT: What do you say to his objection?

2 MS. ALBERT: I can rephrase my question so it's
3 clearer.

4 Q Can you tell me whether or not the steps of the
5 current Punchout process when initiating a new Punchout
6 session differ from those in the Punchout process used in
7 the infringing configurations?

8 A They do not.

9 Q How does the fact that no changes were made to these
10 various modules, applications, and programs in the
11 infringing configurations relate to your analysis of
12 whether the current systems with RQC are more than
13 colorably different from those that were found to be
14 infringing?

15 A This tells me that because there were no changes to
16 anything by RSS, the same capabilities that were present
17 in the infringing system are still present in the new
18 procurement system using RQC. The only thing that's been
19 modified is the user interface. None of the core
20 functionality that enables procurement has been changed.

21 MS. ALBERT: Your Honor, just for point of order,
22 I don't believe I moved the admission of Plaintiff's
23 Exhibit 1000.

24 THE COURT: Any objection?

25 MR. THOMASCH: I'm sorry, Your Honor, which

1 exhibit?

2 MS. ALBERT: Plaintiff's Exhibit 1000.

3 MR. THOMASCH: No objection.

4 THE COURT: It's admitted.

5

6 (ePlus Exhibit 1000 admitted.)

7

8 Q Now, let's discuss the change that Lawson contends
9 it's made to the requisition self service --

10 THE COURT: So I understand, we went through all
11 that basically to show what they stipulated, that there
12 had been a change? I didn't understand -- he said that
13 the meaning of the absence-of-changes testimony respecting
14 his colorability analysis, to him, and the import of it to
15 his opinion was that it identifies there had been only one
16 change made. I thought that's what they stipulated to.

17 MS. ALBERT: I think he's said there's no change
18 in the underlying procurement functionality.

19 THE COURT: Well, he said that, but he said that
20 all the way up, but he didn't explain why that had
21 anything do with the colorability analysis.

22 Q Can you explain why the fact that there have been no
23 changes made to the various modules, applications, and
24 programs in the infringing configurations but for the
25 change made to requisition self service has any bearing on

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1 your analysis of whether the accused systems with RQC are
2 more than colorably different from those that were found
3 to be infringing?

4 A The capability of RQC in the procurement system is the
5 same with regard to claim 26. All elements of claim 26
6 can still be practiced. So there is -- there is no
7 significant difference in the operation of RQC as viewed
8 in light of claim 26.

9 MR. THOMASCH: Objection; motion to strike. I
10 believe that is precisely the infringement based
11 colorability analysis that *TiVo* says is no longer
12 permitted.

13 MS. ALBERT: That's the threshold inquiry that
14 *TiVo* requires you to make, and that is whether or not the
15 modification that was made is one to a random feature or
16 whether it has bearing on features that were used in the
17 infringing product to perform the claim, and so what Dr.
18 Weaver is saying is that the change has no bearing on any
19 feature that was used to perform the elements of the
20 claim, and that's the threshold --

21 THE COURT: Is that what you just said?

22 THE WITNESS: Yes, sir.

23 MS. ALBERT: And if that is true, then you don't
24 even get to any further part in the *TiVo* test. As a
25 matter of law, there is no colorable difference because

1 the change relates to a feature that's not relevant to the
2 claim.

3 MR. THOMASCH: Counsel's last comment, that last
4 segment of it, is correct. If there is a random feature,
5 then the significance of a random feature doesn't matter.
6 Our defense, I have made clear, relates to a particular
7 feature.

8 If it's random, we don't need to proceed further.
9 It is not random, and *TiVo* says that the determination of
10 randomness, what is a random feature and what is not,
11 depends, Your Honor, on what was contended and proved at
12 trial. We went over and over again and attempted to get
13 the plaintiffs to identify what was contended and proved
14 at trial that would be the predicate for identifying what
15 this hearing would be, what, in Your Honor's words, was
16 the animal against which we would measure the
17 modification.

18 We were not given anything other than the
19 position of ePlus was, we've already identified the three
20 changes that were at issue, and there were three before
21 the Federal Circuit decision came down, and now it's just
22 the one two-part change.

23 But their position was that's a threshold issue
24 to identify what the hearing is about. We already know
25 what the hearing is about. Once we are here, the issue of

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1 relevance between the change and the claim, *TiVo* says, is
2 not the issue. The issue is between the modified feature
3 and the original feature.

4 THE COURT: I think that morphed into about three
5 different points not really responsive to her point as to
6 why this particular testimony was relevant. The objection
7 is overruled.

8 Q Dr. Weaver, let's turn now to discuss the change that
9 Lawson contends it's made to the requisition self service
10 application in connection its release of RQC. Can we see
11 Plaintiff's Exhibit 1155, please. What is this exhibit,
12 Dr. Weaver?

13 THE COURT: What exhibit is it?

14 THE CLERK: 1155, Your Honor.

15 THE COURT: All right.

16 A This is a set of PowerPoint slides that Lawson posted
17 on its website to explain the differences between RSS and
18 RQC to its customers and to the public.

19 Q And did you review and rely upon this document for
20 purposes of your analysis?

21 A I did.

22 Q Let's look at page RQC 711. Under the heading What's
23 New and Different in Requisition Center, what bullet is
24 relevant to our analysis today with respect to claim 26 of
25 the '683 patent?

1 A It's the fifth one down. It says, Requisition Center
2 requires that items ordered through Punchout must be on a
3 separate requisition from items from the item master or
4 special/service. In addition, Requisition Center will
5 create separate requisitions for each Punchout vendor for
6 items requisitioned using Punchout.

7 Q Now, with respect to the modification that Lawson has
8 made to the system such that Punchout items are placed on
9 a separate requisition from items selected by searching
10 the catalogs in the item master, is that modification
11 relevant to any functionality of claim 26?

12 MR. THOMASCH: Objection, Your Honor. Same
13 grounds as previously stated.

14 THE COURT: Overruled.

15 A Would you repeat the question.

16 Q With respect to the modification that's directed to
17 preventing a system, the system -- let me start over
18 again.

19 With respect to the modification that Lawson has made
20 to the systems such that Punchout items must be on a
21 separate requisition from items selected by searching the
22 catalog stored in the item master, is that modification
23 relevant to any of the functionality of claim 26?

24 A No, it is not.

25 Q Is the modification that prevents items from shopping

1 sessions conducted at multiple Punchout sites from being
2 included in a single requisition relevant to any feature
3 recited in claim 26?

4 A No, it is not.

5 Q Can you describe how the system with RQC now works
6 with respect to Punchout items?

7 A Sure. So if a user has selected a catalog in the item
8 master and has picked an item to add to the order list and
9 then at that point attempts to do a punchout, then that
10 will not succeed. There will be a popup window that tells
11 you you can't do that.

12 Q What happens if you try to add a Punchout item to --
13 I'm sorry, strike that.

14 Let's look at page RQC 718, please.

15 THE COURT: On 1155?

16 MS. ALBERT: Yes.

17 Q What is illustrated on this page?

18 A This is the order list or requisition lines in which
19 an item has already been added from the item master, and
20 at that point, the user has selected the Punchout choice
21 from the drop-down menu of find and shop. And the
22 result -- let me get rid of those -- is this popup window
23 that says Punchout items must be on a separate
24 requisition.

25 MS. ALBERT: I move the admission of Plaintiff's

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1 Exhibit 1155.

2 THE COURT: Any objection?

3 MR. THOMASCH: No objection.

4 THE COURT: It's admitted.

5

6 (ePlus Exhibit 1155 admitted.)

7

8 Q Let's look at Plaintiff's Exhibit 1032. What is
9 Plaintiff's Exhibit 1032?

10 A This is an internal Lawson email that is trying to
11 communicate some concerns, and as you can see from the
12 subject line up here, it's about changes being brought
13 with Requisition Center.

14 Q And referring to the bottom email from Matthew
15 Bragstad, he says, quote, I wanted to make sure that the
16 support leadership team was aware of the changes that RQC
17 has brought. Do you see that statement?

18 A I do.

19 Q And how did he describe the changes that RQC has
20 brought?

21 A So beginning just under that line, he says, besides
22 some label/visual, (or lipstick on a big as Dale so
23 eloquently puts it), changes -- there were three
24 functional adjustments, and the one that's relevant to us
25 is number three.

1 The process in which Punchout is being performed has
2 changed slightly. You now get a warning popup that you
3 are about to leave the Lawson site when you punch out.
4 The process remains completely the same except if you try
5 to punch out on a req that is already in use with
6 non-Punchout items, it will tell you that you need to open
7 a separate req, and it will perform that action for you.

8 Q What does this communication tell you about how Lawson
9 has internally characterized the change brought by RQC
10 with respect to Punchout?

11 A So here we see Lawson employees that are telling each
12 other that the Punchout process remains, quote, exactly
13 the same, unquote, except for a popup message. So Lawson
14 is characterizing this change as insignificant.

15 MR. THOMASCH: Objection, Your Honor, motion to
16 strike. I don't believe the witness has expertise in
17 interpreting emails, and to characterize the -- the
18 document says what the document says. It has not yet been
19 offered into evidence. We will have an objection when it
20 does, but in the meantime, we certainly object to the
21 witness both reading from a document not in evidence and
22 then characterizing what is meant by two individuals
23 without any showing of firsthand knowledge and on a
24 subject matter which the expertise of the witness is not
25 brought to bear.

1 THE COURT: Why is he an expert in explaining
2 what documents mean?

3 MS. ALBERT: Well, let me rephrase my question.

4 THE COURT: Sustained.

5 Q What does this communication indicate to you about
6 whether the difference that's brought with RQC and
7 Punchout item is -- whether or not that's more than
8 colorable difference from the infringing configurations?

9 MR. THOMASCH: Your Honor, note my objection
10 again on grounds that it's not a proper basis. There's no
11 foundation that this interpretation of emails of witnesses
12 who have not testified in the case is a proper basis for
13 an expert opinion or regularly relied upon by experts in
14 the field of computer science.

15 Q Would experts in the field of computer science
16 regularly rely upon internal communications among
17 technical personnel discussing changes in a particular
18 system?

19 A Yes, they would.

20 THE COURT: Objection overruled. So the question
21 is now what does it mean to you. That's the question;
22 right?

23 Q The question is, what does this communication tell
24 you, for purposes of your analysis, as to whether the
25 systems with RQC and Punchout are more than colorably

1 different from the infringing configurations?

2 A It tells me that they are not more than colorably
3 different because the change is so insignificant.

4 MS. ALBERT: Your Honor, I would move the
5 admission of Plaintiff's Exhibit 1032 into evidence.

6 THE COURT: Any objection?

7 MR. THOMASCH: Yes, Your Honor. Lack of
8 foundation. I do note the witness that wrote the email
9 will not testify and has not been deposed. There will be
10 testimony from a witness who saw the email. I don't
11 believe that the foundation is proper coming into evidence
12 through Dr. Weaver.

13 THE COURT: There's no foundation. Is there
14 objection to the authenticity?

15 MR. THOMASCH: There's no objection to
16 authenticity but lack of foundation, Your Honor.

17 THE COURT: What is your response to his
18 objection?

19 MS. ALBERT: It's the type of evidence that an
20 expert can rely upon in forming his opinions, and he has
21 relied upon this and has discussed it in his report, and
22 it does bear on his opinion as to whether or not it's more
23 than colorably different.

24 Under Rule 703, an expert may base an opinion on
25 facts or data in the case that the expert has been made

1 aware of or personally observed. If experts in the
2 particular field would reasonably have relied upon those
3 kinds of facts or data in forming an opinion on the
4 subject, they need not be admissible for the opinion to be
5 admitted.

6 MR. THOMASCH: Your Honor, that's --

7 THE COURT: I think that's the point he's making,
8 is that he didn't object to the opinion. He objected to
9 the introduction of the document because the document
10 doesn't come into evidence under 703.

11 703 doesn't get it into evidence just because
12 it's the kind of document that an expert relies upon. It
13 is up to you to get it into evidence by using some aspect
14 of the Rules of Evidence other than the fact that the
15 expert relied upon it, as I understand the objection, and
16 I think that objection is well-taken.

17 MS. ALBERT: Yes, Your Honor. We'll lay the
18 foundation with a different witness.

19 THE COURT: All right.

20 Q Let's turn back to claim 26 if we could. Dr. Weaver,
21 do you have an understanding as to which claim elements
22 Lawson contends that the modifications relate to?

23 A Yes.

24 MR. THOMASCH: Objection, Your Honor, both to the
25 subject matter generally and to his understanding of our

1 allegations, allegations that we are -- have not made in
2 this portion of the case.

3 MS. ALBERT: I'll withdraw my question.

4 THE COURT: All right.

5 Q Do the modifications relating to requisitions with
6 Punchout items have any impact on the capability of the
7 configurations having RQC to maintain at least two product
8 catalogs on a database continuing data relating to items
9 associated with the respective sources?

10 A It did not. A procurement system using RQC continues
11 to have the capability of holding items from multiple
12 vendors and multiple catalogs as was true with the
13 infringing systems, and I saw confirmation of that in
14 deposition testimony.

15 Q Can you tell us whether or not the modifications have
16 any impact on the capability of the systems having RQC to
17 maintain connections to the catalogs of multiple Punchout
18 vendors?

19 A No, that capability still exists. There are no
20 changes made there.

21 Q Can you tell us whether or not the modifications have
22 any impact on the capability of the configurations having
23 RQC to maintain connections to multi-vendor Punchout sites
24 that host multiple vendor catalogs at a single site?

25 A That capability still exists and was confirmed in

1 depositions and documents.

2 Q What are some examples of these multi-vendor Punchout
3 sites that host multiple vendor product catalogs?

4 A The two we discussed a trial were SciQuest and Global
5 Health Exchange, DHX.

6 MR. THOMASCH: Objection, Your Honor. Move to
7 strike the testimony, and I actually believe that does
8 mistake the trial testimony, and our basis is that Your
9 Honor has seemingly prevented us from going into what was
10 said at trial as the basis to show what was contended and
11 proved.

12 THE COURT: What was contended and proved. I
13 think that we need to stay away from that kind of
14 testimony. You all objected to it, and I sustained your
15 objection, and I think it was right, but you can't then
16 get in through the back door that which you've shut out
17 the front door.

18 Q Are you aware of evidence --

19 THE COURT: I sustain the objection and strike
20 the testimony, and you may ask another question designed
21 to get something other than that which was stricken.

22 Q Are you aware of evidence in the discovery in this
23 contempt proceeding as to examples of multi-vendor
24 Punchout sites that host multiple vendor product catalogs?

25 A Yes, I am.

1 Q What are some examples that have been provided during
2 discovery in the contempt proceeding of multi-vendor
3 Punchout catalogs?

4 A Well, the example I'm thinking of is the list of
5 Punchout trading partners associated with Lawson, and
6 SciQuest and Global Health Exchange appear on that list as
7 pre-approved trading partners.

8 Q Now, referring to the second and third elements of
9 claim 26 reciting selecting the product catalogs to search
10 and searching for matching items among the selected
11 product catalogs, did the Court have a claim construction
12 relevant to those claim terms?

13 MR. THOMASCH: Objection, Your Honor. I do
14 believe the claims construction is not relevant to the
15 colorability phase. There are issues about claims
16 construction that relate to the infringement phase.

17 THE COURT: It might be -- certainly it's
18 relevant in that phase, but she hasn't asked a question
19 that implicates your objection at this stage. She simply
20 asked if there was one and he was aware of it.

21 MR. THOMASCH: Thank you.

22 A Yes, there is. The Court's Markman ruling, the ruling
23 said that --

24 MR. THOMASCH: Objection, Your Honor. The
25 question was whether there was a ruling. The answer is

1 yes. Now the question is --

2 THE COURT: No, there isn't any question.

3 There's no question yet.

4 Q What is your understanding of what the Court defined
5 those claim elements to require?

6 THE COURT: Aren't they already defined? Why do
7 we need to get into that? You didn't want their expert to
8 be able to explain what I said, and it's there for better
9 or worse, and the Federal Circuit -- I don't know if it
10 was even brought to the Federal Circuit.

11 MS. ALBERT: Thank you, Your Honor. I'll move
12 on.

13 Q Did the modifications relating to requisitions with
14 Punchout items eliminate the capability from the
15 configurations with RQC to select and then search a
16 product catalog from among the at least two product
17 catalogs?

18 A No, it did not, and if we get to it, I'll show that in
19 my demonstration.

20 Q What are some examples of ways the configurations with
21 Requisition Center and Punchout have the capability to
22 select and then search a property catalog from among the
23 at least two product catalogs?

24 A In my demonstration, I'll show that there are catalogs
25 from Staples and from Dell, and one can do a Punchout

1 where you can select one catalog or the other, and in the
2 selected catalog you can search for items, put them in a
3 shopping cart, bring those back to the Lawson Requisition
4 Center.

5 MR. THOMASCH: Objection, Your Honor, and move to
6 strike on the basis that we're getting a description of a
7 demonstration. The demonstration was not disclosed in the
8 expert witness report as relating to any colorability
9 analysis as to claim 26. There is a demonstration with
10 respect to infringement. There was once a demonstration
11 with respect to the converting element of claim 28, but
12 the expert witness report does not talk on this subject
13 matter, and so this testimony is beyond the scope of the
14 expert report, and I would move to exclude it.

15 Q Without reference to your demonstrations, did the
16 modifications relating to requisitions with Punchout items
17 eliminate from the configuration --

18 THE COURT: Excuse me. I believe I need to rule.

19 MR. THOMASCH: Correct, I have a motion to
20 strike.

21 THE COURT: Yes. You've responded to that by
22 rephrasing the question, I think, so I sustain the
23 objection in view of your approach to rephrasing the
24 question and strike the answer, and now you may ask your
25 question.

1 Q Without reference to any demonstrations that we
2 haven't seen yet, did the modifications relating to
3 requisitions with Punchout items eliminate from the
4 configurations having Requisition Center the capability to
5 select and then search a product catalog from among the at
6 least two product catalogs included in the configuration?

7 A They did not.

8 Q And what are some of the ways that the configurations
9 having Requisition Center have the capability to select
10 and then search a product catalog from among at least two
11 product catalogs?

12 MR. THOMASCH: Objection, Your Honor, to the form
13 of the question which makes no reference to whether this
14 is a derivative of the change that was made to the
15 product. It's a similar objection to what we made before,
16 but I feel compelled to make it again, Your Honor.

17 THE COURT: Overruled.

18 A One can punch out to one of Lawson's trading partners
19 and then bring back items to put in requisitions, and then
20 one can select a different -- well, and then turn that
21 requisition into a purchase order, and then one could
22 select a different Punchout site and do the same thing, or
23 one could select a multi-vendor Punchout site and search
24 that and find multiple items from multiple vendors.

25 Q Does the system with Requisition Center include the

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1 capability to select and search a product catalog from
2 among the catalogs included in the item master?

3 A Yes, it does.

4 THE COURT: You are talking about the system as
5 modified.

6 MS. ALBERT: The system having Requisition
7 Center, does that --

8 THE COURT: I know, but I think that's what you
9 mean, but I didn't know that. The record needs to be
10 clear about which system you are talking about, because
11 you've talked about a pre-change system and a post-change
12 system.

13 Q Do you have an understanding --

14 THE COURT: Wait a minute. Excuse me.

15 MR. THOMASCH: We object on the form of the
16 question with respect to the aspects of the item master
17 which were not changed and to the use of the phrase
18 catalogs in item master. That raises a whole different
19 issue again as to what was -- what was found by the jury
20 in the first trial given the very split verdict.

21 We don't object to phraseology which talks about
22 items from item master as a more neutral way of dealing
23 with it, but we do object to any testimony about the
24 unchanged feature.

25 THE COURT: I think neither the witness nor I

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1 could understand anything that was said hereafter given
2 what I said, what you said, and what you said. So why
3 don't you start again and without me having to rule on
4 anything.

5 Q Did the modifications relating to requisitions with
6 Punchout items eliminate from the Requisition Center
7 configurations the capability to select and search a
8 product catalog from among the product catalogs included
9 in the item master?

10 A It did not.

11 MR. THOMASCH: Same objection, Your Honor.

12 THE COURT: Overruled.

13 Q Now, referring to the fourth element of claim 26
14 reciting building a requisition using data related to
15 selecting matching items and their associated source or
16 sources, did the modifications with respect to
17 requisitions with Punchout items remove the capability
18 from the configurations having RQC to build a requisition
19 using selected matching items and their associated source
20 or sources?

21 MR. THOMASCH: Objection, Your Honor, again. I
22 believe there's a proper infringement question if we've
23 reached infringement as to whether the RQC system
24 infringes. That is a different question entirely from
25 whether it removes some capacity from infringement when

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1 there is a dispute about what infringement was found at
2 the first trial.

3 This is not the right way, in our opinion, to
4 follow *TiVo* with respect to colorability. This goes to
5 infringement.

6 THE COURT: Overruled.

7 MS. ALBERT: Thank you, Your Honor. I think the
8 question is still pending.

9 THE COURT: Ask it so he can understand it and
10 answer it. His objection is preserved.

11 Q Did the modifications with respect to requisitions
12 with Punchout items remove the capability from the RQC
13 configurations to be able to build a requisition using
14 data related to selected matching items and their
15 associated source or sources?

16 A No, it didn't. One can continue to search a single
17 catalog and select one or more items from that single
18 catalog, so that single source, and then generate a single
19 requisition that reflects that single source, or one could
20 select multiple product catalogs either from the item
21 master or from a multi-vendor Punchout site and then bring
22 back multiple items -- one could select multiple items
23 from multiple vendors and then bring that back into the
24 requisition lines to form a single requisition.

25 Q Did the --

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1 THE COURT: You're talking about using RQC?

2 THE WITNESS: Yes, sir, using RQC.

3 Q Did the modifications with respect to requisitions
4 with Punchout items remove the capability of processing
5 the requisition to generate one or more purchase orders
6 for the selected matching items from the RQC
7 configurations?

8 A It did not.

9 Q Does the modification relating to requisitions with
10 Punchout items have any relevance to the capability of
11 determining whether a selected matching item is available
12 in inventory?

13 A It does not.

14 Q And do the systems configurations having Requisition
15 Center and Punchout have the capability to determine
16 whether a selected matching item is available in
17 inventory?

18 A Yes. They continue to have that ability using
19 Punchout or EDI.

20 MR. THOMASCH: Note my objection, Your Honor, to
21 the witness's testimony, and this is a continued activity
22 from an unchanged feature.

23 THE COURT: Overruled.

24 Q Have you reviewed documentation relating to how Lawson
25 has described the changes that were made to RSS, both

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1 internally and to its customers?

2 A Yes, I have.

3 Q Let's look at some of those. Let's look at
4 Plaintiff's Exhibit 1010. What is this exhibit?

5 A This is an email that is providing a preview of
6 announcement --

7 THE COURT: Wait a minute. 1010 is --

8 THE WITNESS: Oh, I'm sorry.

9 THE COURT: -- something, not an email. It may
10 have been sent by email, but it's not what I refer to --

11 THE WITNESS: My mistake. I opened 1110 by
12 accident.

13 THE COURT: All right, that's fine. That way
14 we'll be ahead of the game.

15 A Now using the correct exhibit, 1010, this is a set of
16 PowerPoint slides from a webinar where, as the title
17 shows, Lawson is introducing the Lawson Requisition
18 Center.

19 Q And let's turn to page RQC 661. How does Lawson
20 describe the Requisition Center application to its
21 customers here?

22 A In the third bullet, it says, its designed to minimize
23 impact on our customers.

24 Q Let's refer to page RQC 665. Under the heading
25 Designed with Three Principles in Mind, what does Lawson

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1 say about the functionality of the Requisition Center
2 application?

3 A It says that RQC has 100 percent functionality you
4 require must be included.

5 Q Under the heading Implementation straightforward, what
6 does Lawson indicate concerning implementation of
7 Requisition Center?

8 A It says, no database changes, no required upgrades in
9 software or environment.

10 Q So what is your takeaway from this exhibit with
11 respect to whether or not the systems having Requisition
12 Center are more than colorably different from those that
13 were found to be infringing?

14 MR. THOMASCH: Objection to the form of the
15 question and lack of specificity of these changes to the
16 issue that relates to the changed features in Punchout.
17 We do know, Your Honor, that there were multiple changes
18 to RQC that are not at issue in this case.

19 MS. ALBERT: I think that the document speaks in
20 general to Requisition Center and the changes including
21 the change to requisitioning with Punchout, and,
22 therefore, it is relevant to --

23 THE COURT: It may be, but given there are
24 changes that are not at issue, maybe the best thing to do
25 is to phrase the question to deal with the changes that

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1 are at issue, and that makes it more helpful to the finder
2 of the fact in understanding the evidence.

3 Q How does this exhibit bear or impact upon your
4 analysis of whether the systems with Requisition Center
5 and Punchout are more than colorably different from those
6 that were found to infringe?

7 A Because we see here that a design principle is
8 100 percent functionality that you require must be
9 included, that says that RQC is going to include Punchout
10 as a requirement -- well, RQC and Punchout will both be
11 required.

12 It tells me that RQC is going to have the same
13 functionality as RSS because it says 100 percent
14 functionality require must be included. And so in my
15 opinion, RQC has only minor changes from RSS.

16 MR. THOMASCH: Objection, Your Honor, move to
17 strike the last portion of that answer which interpreted
18 and assumed what the document meant beyond the words that
19 were stated and changed specifically the words "you
20 require" to what "you previously had."

21 And there's testimony on this, Your Honor.
22 Witnesses with knowledge were asked about this and
23 distinguished it, and now a witness without knowledge
24 comes in and interprets the language of a document, and
25 that's what we find to be improper.

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1 MS. ALBERT: This testimony was how it bears upon
2 his analysis of the colorability issue. I think he's
3 permitted to say how it -- what his takeaway is from
4 reading the document and how it bears upon his analysis.

5 MR. THOMASCH: Again, Your Honor, I don't think
6 this witness has any special knowledge in interpreting
7 internal documents to say things that they don't say.

8 THE COURT: Objection overruled.

9 MS. ALBERT: I would move the admission of
10 Plaintiff's Exhibit 1010.

11 THE COURT: Any objection?

12 MR. THOMASCH: Objection to it coming in through
13 this witness, Your Honor.

14 MS. ALBERT: You had no objections that you
15 interposed.

16 MR. THOMASCH: Again, Your Honor, we do not
17 object to this document -- if this document is shown to a
18 witness that was actually on the scene and knows what was
19 said in the document, we will not object to the document
20 coming in.

21 We object to it coming in through an expert who
22 is allowed to testify regardless of its admissibility.
23 703 is not an independent basis for admissibility. No
24 other foundation has been laid.

25 THE COURT: And your answer is? You have to lay

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1 a foundation. You have to get a document in by something
2 other than 703, because 703 actually says that the expert
3 can testify even if it's not admissible, a document is not
4 admissible, and he's been allowed to so testify, but that
5 doesn't get the document in. So there needs to be some
6 basis for getting the document in.

7 Now, I guess I'm a little -- I don't quite
8 understand what you mean, Ms. Albert, by saying you didn't
9 object to this earlier. Was it our protocol here that
10 there were objections -- exhibits filed, objections
11 lodged, and the absence of an objection had the effect, as
12 it does in the pretrial order, of meaning there's no
13 objection to it and the document can be used?

14 MS. ALBERT: That was our understanding of Your
15 Honor's pretrial order.

16 THE COURT: Do you have the order, because I
17 don't happen to have it right here.

18 MS. ALBERT: Yes, I do.

19 THE COURT: It's the second time you've raised
20 it. The last time he dealt with it by saying there was
21 another objection that covered it, and you rephrased it.
22 All exhibits to which no objection is made shall be
23 admitted without further order according to docket number
24 115.

25 MR. THOMASCH: Your Honor, may I address that?

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1 THE COURT: I will have to say that I believe
2 that the document you are talking about was entered at the
3 commencement of the case in 2009, and I guess what I
4 was -- this is the rule for trial, and I guess what I was
5 trying to say is, is there some other order or
6 understanding between the two sides that if you listed
7 documents as exhibits and the other side didn't object to
8 them, that they were admitted?

9 There has to be something to animate that
10 concept, and the animation of that concept at the trial
11 was docket number 115 which you just handed me. That's
12 the rule, and it's been the rule here for years. However,
13 we didn't have a final pretrial conference, and I'm not
14 sure that order actually -- I don't think that that order
15 that you pointed to, docket number 115, actually governs
16 the process -- the procedure here unless somehow you all
17 have taken that concept and made it applicable here.

18 MS. ALBERT: Your Honor required us to submit in
19 a filing last week the list of exhibits to which no
20 objections were raised, and this was included on that
21 list.

22 THE COURT: Now, give me that document so I can
23 follow what you are saying. I have ePlus exhibit list,
24 and --

25 MS. ALBERT: We had a joint submission of the

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1 parties.

2 THE COURT: Yes. I just don't happen to have it
3 up here.

4 MR. THOMASCH: Your Honor, might I make reference
5 to our objection as stated and filed and as given to the
6 plaintiff's counsel.

7 THE COURT: Can you let me get all this stuff in
8 front of me first?

9 MR. THOMASCH: Absolutely, Your Honor.

10 THE COURT: You say there is an objection you did
11 lodge?

12 MR. THOMASCH: We had two objections, Your Honor.

13 THE COURT: I mean did you lodge it in a paper.

14 MR. THOMASCH: Yes, we did.

15 THE COURT: What is the docket number of that
16 paper so I can get it in front of me?

17 MR. THOMASCH: They were exchanged between the
18 parties, Your Honor, but to my knowledge, they were not
19 filed.

20 THE COURT: Not, filed okay.

21 MR. THOMASCH: I have it in front me
22 electronically, and I do know what our objections were.

23 THE COURT: I understand, but your electrons
24 don't get to my electrons.

25 MR. THOMASCH: I know Your Honor.

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1 THE COURT: Does somebody have the documents, I
2 guess, they're talking about so I can look at it? Do you
3 have more than one copy?

4 MS. ALBERT: I don't know if we have more than
5 one copy.

6 THE COURT: All right. Why don't we do this:
7 Why don't you -- do you want to hand it to me? This is a
8 list of documents that are agreed upon, and it's docket
9 number -- what is it now, Ms. Albert? 110? 1010.

10 MS. ALBERT: I think it's on the first page.

11 THE COURT: It says, it's here as a joint list of
12 exhibits that are agreed upon, Mr. Thomasch, so it looks
13 to me like that unless there's something that I don't
14 understand, it's in.

15 MR. THOMASCH: Yes, Your Honor. If I might
16 address it briefly.

17 THE COURT: Yes.

18 MR. THOMASCH: To the extent that it was
19 identified on plaintiff's exhibit list, we objected
20 specifically under Rule 403. We also objected as our
21 first general objection, Your Honor, to -- general
22 objection number one, Lawson objects to the inclusion in
23 the record of any designated exhibit that is offered by
24 ePlus but is not the subject of a testimony at the
25 contempt proceeding by a witness having personal knowledge

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1 of the document. That is the basis. We do believe that
2 to set a foundation --

3 THE COURT: Wait just a minute. Wait just a
4 minute. What date was that, all that filed?

5 MR. THOMASCH: That was March 18th.

6 THE COURT: On March 20th, though, you all filed
7 in a document that superseded that. It says here the
8 documents that are agreed upon presumably notwithstanding
9 your previously lodged objections, because one's agreement
10 supersedes one's prior objections, I think.

11 MR. THOMASCH: I understand, Your Honor. It is
12 actually a very practical objection that we have. I don't
13 dispute that this document can come into evidence and can
14 come into evidence through a witness with personal
15 knowledge. This is not such a witness.

16 I will tell Your Honor, I labored over how are we
17 to interpret the rule in good faith, and we made it clear
18 that it isn't the document. It isn't that we say that
19 this is inadmissible through anyone, but we do say in
20 order to admit the document, you have to have personal
21 knowledge.

22 If we had a witness with personal knowledge,
23 cross-examination or examination about the document would
24 be fruitful. We object on the admission of the document
25 through a witness through whom no foundation has been

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1 made.

2 THE COURT: All right. Now, what do you have to
3 say?

4 MS. ALBERT: I think we're entitled to have
5 notice if there are going to be objections to particular
6 exhibits, particularly after we had a meet-and-confer and
7 we exchanged the list of agreed-upon exhibits with counsel
8 for Lawson prior to submitting this to the Court.

9 THE COURT: All right. Thank you. Once there's
10 an objection filed, the objection stands unless it's
11 resolved. The objection is resolved by an agreement to
12 allow the document to come into evidence. If there is no
13 such agreement, the party tendering the exhibit knows to
14 bring someone or to deal with it in some way other than
15 which results from an agreed-upon exhibit, so the document
16 is in by virtue of the list of exhibits that are agreed
17 upon, and if you believe that that's an erroneous ruling,
18 Mr. Thomasch, just say "yes," and I will say "over
19 objection" on my notation.

20 MR. THOMASCH: Yes, Your Honor.

21 THE COURT: Over objection then. It's in. All
22 right, Ms. Albert.

23 Q Let's turn, if we could, to Plaintiff's Exhibit 1026.
24 What is this exhibit, Dr. Weaver?

25 A This is a set of emails among Lawson employees that

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1 are considering how to respond to client concerns about
2 RQC.

3 Q What were the client concerns about RQC as related by
4 Mr. Ciarochi in the bottom email?

5 A He says, We have heard clients concerned that Req
6 Center is going to be buggy since it is new. Do you have
7 any information that we can send to clients to debunk
8 these concerns?

9 Q And how did Mr. Christopherson respond?

10 A He said, Key is that RQC is built on RSS, so it is not
11 a 100 percent new product.

12 Q And how is this communication relevant to your
13 analysis of whether or not this configuration having RQC
14 are more than colorably different from the infringing
15 configurations?

16 A This tells me that Lawson --

17 MR. THOMASCH: Objection, Your Honor. Beyond the
18 scope of the witness's expert report specifically
19 identified by Bates number, documents the witness used,
20 and unless I have missed it, which could happen in the
21 column of numbers, I don't see it there, Your Honor.

22 MS. ALBERT: It's in his initial report at page
23 22.

24 MR. THOMASCH: Your Honor, it's apparently
25 identified in the body of the report elsewhere other than

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1 colorability where my focus was. So it's a document that,
2 again, goes to a different analysis we would argue.

3 MS. ALBERT: It's in the section of his report --

4 THE COURT: Do I have that report up here? I
5 mean I'm not going -- initial expert report, what page? I
6 have it.

7 MS. ALBERT: It's at page 22.

8 THE COURT: Page what?

9 MS. ALBERT: 22. Do you see on Plaintiff's
10 Exhibit 1026 there's a reference to Christopherson 36?
11 That was the deposition exhibit number. And if you refer
12 to the bullets on that page on page 22, he has a
13 discussion of Christopherson Deposition Exhibit 36.

14 THE COURT: But it is under the section
15 entitled -- no, it's modifications to the infringing
16 configurations are minimal and cosmetic. To me, that
17 doesn't confine it to an infringement analysis, Mr.
18 Thomasch.

19 It means that it's pertinent to the colorability
20 analysis. Objection overruled. And I think that's clear
21 from the rest of the report as well. You haven't answered
22 the question, though, Doctor, I don't believe.

23 Q I think the question was, how does this communication
24 impact your analysis of whether or not the systems having
25 RQC are more than colorably -- whether or not they are

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1 more than colorably different from the infringing
2 configurations?

3 A This document confirms that Lawson used the code from
4 RSS in order to create RQC.

5 THE COURT: You mean confirms your opinion on
6 that; is that what you are saying?

7 THE WITNESS: Yes, sir.

8 Q And does that, the fact that they used the code from
9 RSS to form RQC have any bearing on whether or not the
10 changes are more than colorable between the RQC
11 configurations and the infringing configurations?

12 A They are not more than colorably different.

13 MS. ALBERT: I would move the admission of
14 Plaintiff's Exhibit 1026 into evidence.

15 THE COURT: Any objection?

16 MR. THOMASCH: Yes, Your Honor, on previously
17 stated grounds.

18 THE COURT: Is this in the agreed-upon --

19 MS. ALBERT: Yes.

20 THE COURT: -- exhibits? Is it covered by that
21 agreed-upon list?

22 MS. ALBERT: Yes, it is, Your Honor.

23 THE COURT: It's admitted over your objection on
24 the basis of the agreement reflected in docket number --
25 what is it? What is that docket number?

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1 MS. ALBERT: It's docket number 1030.

2 THE COURT: 1030, okay. Thank you.

3 Q Now let's look at Plaintiff's Exhibit 1123, if we
4 could. Is this document one that you reviewed in
5 connection with your analyses?

6 A Yes, it is.

7 Q Does this exhibit relate to the prior exhibit?

8 A Yes. This is Mr. Lohkamp's response to the same
9 question.

10 Q What was Mr. Lohkamp's response to Mr. Ciarochi's
11 question?

12 A In the second bullet --

13 THE COURT: Excuse me. What exhibit number is
14 it?

15 MS. ALBERT: Plaintiff's Exhibit 1123.

16 THE COURT: I'm sorry. I was looking in the
17 wrong section. All right, go ahead.

18 A In the second bullet, Mr. Lohkamp says, since RQC is
19 based on RSS code, it is not a 100 percent new product,
20 and, thus, most of the code has been tested/used many
21 times. And when you look at the differences, most changes
22 would have very minimal code impact and, thus, a limited
23 risk.

24 Q So how does this exhibit bear on your analysis of
25 whether the configurations having RQC are more than

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1 colorably different from the infringing configurations?

2 MR. THOMASCH: Objection, Your Honor, relevance,
3 given that the testimony just read was about most changes
4 having minimal. I believe that the document does not
5 address the changes that were made and, again, take us
6 outside of the *TiVo* analysis.

7 THE COURT: Overruled. It goes to the weight,
8 not admissibility. Now you need to get the question and
9 the answer, and he's got his objection.

10 Q How does this communication impact your analysis of
11 whether or not the systems having RQC are more than
12 colorably different from the infringing configurations?

13 A Mr. Lohkamp's response is telling them that there
14 shouldn't be any bugs because this is not a new product.
15 The fact that he says there are very minimal code impact
16 suggests that there are only minimal changes, and the fact
17 that he says that there is limited risk of using this
18 suggests to me that there's been a large reuse of RSS code
19 in building RQC.

20 MS. ALBERT: I would move the admission of
21 Plaintiff's Exhibit 1123.

22 MR. THOMASCH: Same objection, Your Honor, about
23 the witness not having established a foundation.

24 THE COURT: Is this covered by 1031 as well?

25 MS. ALBERT: Well, the objection that was raised

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1 was one to relevance, and I think we've established that
2 it has relevance to the issue of whether or not the
3 differences are more than colorable.

4 THE COURT: So the answer is, it's not covered by
5 the agreed upon --

6 MS. ALBERT: No, it's not covered --

7 THE COURT: And the objection raised was
8 relevance?

9 MR. THOMASCH: There is a relevance objection,
10 Your Honor.

11 THE COURT: All right. Overruled.

12 Q Let's look at Plaintiff's Exhibit 1124, please. Did
13 you review this exhibit for purposes of your analysis?

14 A Yes, I did.

15 Q What is it?

16 A This is an email where they are discussing customer
17 concerns about RQC, and the customer wanted to talk to
18 some other customer who had already implemented RQC.

19 Q And what was Mr. Lohkamp's response to the inquiry?

20 A He said, we have a couple customers thinking of moving
21 quickly, but none are live yet to my knowledge, and below
22 that, implementation should be similar to installing a new
23 version of RSS.

24 Q How did Mindy Klebe respond to the inquiry?

25 A She said, I agree with Keith. Requisition Center is

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1 installed here, and "here" means at Lawson. I've tested
2 it. It works the same as RSS XML. There is some cosmetic
3 changes such as changing checkout to release and shopping
4 carts and requisition lines. It looks/appears exactly
5 like RSS XML did. It uses the exact same files and
6 programs as RSS and installs the same as RSS did. The
7 only change that is, quote, major, quote, if you want to
8 call it that, is that when you add an item to the shopping
9 cart now, it adds the requisition line. There is no save
10 needed anymore. So, it's basically acting a lot more like
11 RQ10. Otherwise, users will probably not even notice the
12 difference really.

13 Q What does this internal Lawson communication indicate
14 to you as far as any differences between the
15 configurations having RQC and the infringing
16 configurations with RSS?

17 A This says that RQC works the same as RSS except for
18 the cosmetic changes, and importantly to my analysis,
19 Mindy Klebe says, customers will not notice the
20 difference.

21 MS. ALBERT: I would move the admission of
22 Plaintiff's Exhibit 1124.

23 MR. THOMASCH: Your Honor --

24 THE COURT: Is it on the agreed list?

25 MS. ALBERT: No, it is not.

1 THE COURT: And the objection is?

2 MR. THOMASCH: The objection, Your Honor, was
3 both hearsay and objection on relevance grounds.

4 MS. ALBERT: I would say it's relevant to show
5 how Lawson characterized the differences between RQC and
6 RSS, and I would also say it's not hearsay because under
7 801, it's the admission of a party opponent.

8 MR. THOMASCH: Your Honor, I would indicate in
9 response to that that the document, by its terms, is
10 dealing with things such as checkout to release and
11 shopping cart which are RSS features that were prominently
12 at issue with regard to all of the other customers and are
13 no longer at issue in this case. This is a document that
14 relates to other issues on its face.

15 As to the hearsay objection, Your Honor, this is
16 unambiguously hearsay. It is being offered for the truth
17 of the purposes asserted in it. There is no admission.
18 There is no indication that every email between two
19 employees is something that the company has manifested an
20 adoption or agreement of, and I don't know how that
21 analysis could be performed. The admission section of the
22 rules has additional requirements --

23 THE COURT: Give me the rule. My copy of it is
24 blocked by all these nice documents that you all delivered
25 to me, and I can't be a weightlifter and get it up here.

1 Okay, you are saying it comes in under 801 what?

2 MS. ALBERT: 801(d)(2).

3 THE COURT: 801 what?

4 MS. ALBERT: (d)(2).

5 THE COURT: Now, which part of it, because it
6 says it has to be made by a party. The party here is
7 Lawson.

8 MS. ALBERT: Right.

9 THE COURT: That's one. I mean that's (2)(A).
10 (2)(B) is -- first it's offered against an opposing party,
11 so it's qualified under there.

12 Is one the party manifested that it adopted or
13 believed to be true? Are you saying it comes in under
14 (2)(B) or (2)(C), was made by a person whom the party
15 authorized to make a statement on the subject, or (D), was
16 made by the party's agent or employee on a matter within
17 the scope of that relationship and while it existed, or
18 was made by -- coconspirator doesn't --

19 MS. ALBERT: It's made --

20 THE COURT: What does it come in under? There's
21 a lot of stuff under (2)(D).

22 MS. ALBERT: (d)(2)(C), made by a person whom the
23 party authorized to make a statement on the subject.

24 THE COURT: How do we know that? I need to know
25 that.

1 MS. ALBERT: I'm sorry, (d)(2)(D), was made by
2 the party's agent or employee on a matter within the scope
3 of their -- that relationship. Mindy Klebe was one of the
4 people involved with RQC --

5 MR. THOMASCH: Your Honor, I actually would
6 object to counsel trying to provide foundation for a
7 document when not even a foundational question was asked
8 of the witness about 801(d)(2)(D).

9 THE COURT: She's not confined to the witnesses
10 in providing an answer to the foundation if she can find
11 it elsewhere, as, for example, in the document. For
12 example, if the document said, I'm authorized to make this
13 statement or whatever, you know, the document itself can
14 provide the foundation, or if it says, Mindy Klebe,
15 employee on a matter within the scope of that
16 relationship. So -- and there are other places such as
17 other places in the record which they can vouch and say it
18 exists, and I'll connect it up and strike it up if it
19 doesn't get connected up. It doesn't have to be with this
20 witness. I can't imagine this witness would know what
21 Mindy Klebe does --

22 MS. ALBERT: We will connect it up that Mindy
23 Klebe --

24 THE COURT: How are you going to connect it,
25 though, is his question. That is the essence of your

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1 objection.

2 MR. THOMASCH: It is, and that Mindy Klebe is not
3 authorized by Lawson in any function that would relate to
4 the issue of evaluating or considering the significance --

5 THE COURT: They are not offering it under
6 authorized. They are offering it now under (D) which is
7 she's an employee acting within the scope of her
8 employment and making a statement, and it sort of looks
9 like she is, but I don't know that. Just from the text.
10 How are you going to connect it?

11 MS. ALBERT: We'll connect it up through a
12 different witness.

13 THE COURT: All right. Then do you want to hold
14 the objection -- I mean the admission until then, or do
15 you want to admit it subject to connecting it up and
16 having it stricken?

17 MS. ALBERT: Admit subject to connecting it up, I
18 guess.

19 THE COURT: You guess?

20 MS. ALBERT: Yes. I would prefer to admit
21 subject to connecting it up.

22 THE COURT: I'm going to admit it provisionally
23 under 801(d)(2)(D) subject to a foundation in other
24 testimony. All right? You all have to keep up with all
25 this. I'm not going to keep up with who struck John here.

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1 It looks to me like it's probably a good place to take
2 lunch. How much more do you think you have, Ms. Albert?
3 I'm not rushing you. I'm trying to make plans.

4 MR. THOMASCH: Probably about 20 more minutes
5 with this witness.

6 THE COURT: Mr. Thomasch, you have a few
7 questions?

8 MR. THOMASCH: I do have a few questions, Your
9 Honor.

10 THE COURT: All right. Thank you. We'll come
11 back in an hour.

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13 (Luncheon recess.)

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1 THE COURT: I have been informed that somehow
2 there's Internet access in the courtroom and there's
3 not supposed to be access to any Internet. So anybody
4 who has access to the Internet has to take the device
5 and rid themselves of it. Is there anybody? I know
6 there are wi-fis. So who has it? We can't
7 communicate from the courtroom with Internet. And the
8 rule is we can't have access to it in the courtroom.
9 So who's got it? Anybody? Raise your hand.

10 UNIDENTIFIED MAN: Your Honor, my cellphone
11 is capable, but I turned it off and disabled it.

12 ANOTHER UNIDENTIFIED MAN: I have a cellphone
13 also.

14 THE COURT: Off.

15 ANOTHER UNIDENTIFIED MAN: We have a wireless
16 access device.

17 THE COURT: Off. Okay.

18 MS. ALBERT: Your Honor, can I --

19 THE COURT: It's particularly important in
20 cases where there's sensitive material and protected
21 material being discussed because if it happens by
22 chance to be disseminated, then it's out, and that's
23 why the rule exists.

24 All right. Excuse me, Ms. Albert. Resume
25 your examination.

1 MS. ALBERT: I wanted to see if I could take
2 up the housekeeping issue that we had with reference
3 to Plaintiff's Exhibit 1124, and I have, Your Honor, a
4 sworn answer to interrogatory that has been submitted
5 by Lawson in these proceedings marked Plaintiff's
6 Exhibit 1269. It's a not objected to exhibit. And I
7 wanted to refer you to the answer to interrogatory
8 No. 10.

9 THE COURT: All right.

10 MS. ALBERT: Which is on -- there are no page
11 numbers.

12 THE COURT: I've got it.

13 MS. ALBERT: So in the answer to
14 interrogatory 10 where Lawson was asked to identify
15 certain costs relating to development, implementation
16 and maintenance of RQC, they identified personnel on
17 the teams that were required to inspect and test the
18 RQC product during development and launch and listed
19 personnel that had those responsibilities for
20 inspection and testing of RQC.

21 And on the second page of the answer towards
22 the bottom, Mindy Klebe is identified in that capacity
23 as being a support -- Lawson's support personnel with
24 responsibilities in her employment to inspect and test
25 the RQC product during development and launch.

1 So I would submit that the statement made by
2 Mindy Klebe in Plaintiff's Exhibit 1124 was indeed
3 within the scope of her employment and therefore
4 qualifies as a nonhearsay admission of a party
5 opponent under Rule 801(d)(2)(D).

6 THE COURT: Mr. Thomasch, I've read it.

7 MR. THOMASCH: Your Honor, Ms. Klebe is
8 identified with two words. One word. Support. And
9 she's down with a group of other individuals in
10 support, approximately a dozen, 10 to 12, who in total
11 billed 57 hours in the aggregate to in some way be
12 involved in development, installing, implementing and
13 maintaining RQC. Support doesn't do the design.

14 The questions we're going to the
15 functionality of the product and the like. The fact
16 that she is one of a dozen people that collectively
17 spent 57 hours in providing some unidentified support
18 service I would suggest, Your Honor, is not a
19 foundation.

20 If there was a desire to set a foundation,
21 plaintiffs could have done so. They could have
22 deposed her or asked her an interrogatory about her or
23 done something, but this document with the word
24 "support" does not do it in my mind, Your Honor.

25 MS. ALBERT: The interrogatory identifies her

1 as among the team members that were required to
2 inspect and test the RQC product.

3 THE COURT: Where does it say that?

4 MS. ALBERT: In the email --

5 THE COURT: Ms. Albert, where does it say
6 that?

7 MS. ALBERT: It says it on the first page of
8 the answer in the middle of that textural paragraph,
9 Beyond the developer time associated with writing the
10 code for RQC, Lawson also incurred additional costs
11 associated with other teams that were required to
12 inspect and test the RQC product during the
13 development and launch process. The costs are
14 estimated to be \$75,000. Hours associated with those
15 costs are set forth in the following chart.

16 The support costs are identified without
17 hours. And then she's listed as among the support
18 personnel.

19 In the exhibit in question, Plaintiff's
20 Exhibit 1124, she is specifically commenting on things
21 that are within the responsibility identified in the
22 interrogatory. She says, I've tested RQC. It works
23 the same as RSS, XML. Users will not notice a
24 difference. That's clearly within the scope of her
25 responsibilities that are set forth in the

1 interrogatory relating to testing RQC with the
2 development and launch process.

3 MR. THOMASCH: Your Honor, may I ask the
4 witness one question on voir dire?

5 THE COURT: What's that?

6 MR. THOMASCH: May I ask the witness one
7 question on voir dire?

8 THE COURT: What's that got to do with the
9 admission of the document under 801(d)(2)(D)? He
10 doesn't know anything about the admissibility.

11 MR. THOMASCH: That's fine, Your Honor.

12 THE COURT: I don't understand how he
13 could --

14 MR. THOMASCH: You're correct. They
15 originally tried to bring it in through him and now
16 it's a separate issue. I'll respond to that issue
17 when you like, but I withdraw the request.

18 THE COURT: All right. Well, you're offering
19 this answer to interrogatory, to which no objection is
20 made --

21 MS. ALBERT: Correct.

22 THE COURT: -- as proof that Mindy Klebe in
23 this document was an employee who made a statement on
24 a matter within the scope of her relationship as
25 employee and while it existed. Is that right?

1 MS. ALBERT: That's correct.

2 THE COURT: That's what she's offering this
3 to show. What's your position?

4 MR. THOMASCH: Our position is that the
5 document is hearsay. The exception to the hearsay
6 rule has not been met. We certainly have not shown in
7 any way, shape or form that this witness is in a
8 position of employment in which he has either
9 knowledge of or authorization to speak about matters
10 that are relevant to this lawsuit.

11 She may have some knowledge about testing
12 that she may have worked approximately five hours on,
13 but it is an enormous reach to go from a document
14 which identifies things such as checking checkout to
15 release and shopping cart, which are the very changes
16 that are no longer in the case, the document does not
17 say a word about Punchout. There is no knowledge, and
18 I jumped ahead, Your Honor, but there's no indication
19 that she tested a system that had Punchout in it as a
20 separate module.

21 Nothing in here suggested that she even
22 touched or saw or dealt with Punchout. And to that as
23 the foundation for admission of a document I think is
24 woefully insufficient.

25 THE COURT: All right. Anything else?

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1 MS. ALBERT: Nothing else, Your Honor.

2 THE COURT: Objection overruled. It's
3 admitted. There's sufficient evidence to show the
4 statement made by Ms. Klebe was made by her during her
5 employment and in the scope of it based on the answer
6 to the interrogatory. All right.

7 (Plaintiff's Exhibit is admitted.)

8 BY MS. ALBERT:

9 Q Back to you, Dr. Weaver. We were reviewing some
10 exhibits that you had relied upon in your colorability
11 analysis. Let's turn if we could to Plaintiff's
12 Exhibit 1100. What is this exhibit?

13 A This is some email listing from Mr. Hager, some
14 sales messaging points about RQC.

15 Q What does Mr. Hager say here about communications
16 that Lawson should provide to its customers concerning
17 RQC?

18 THE COURT: What exhibit are you on?

19 MS. ALBERT: Plaintiff's Exhibit 1100.

20 THE COURT: Thank you.

21 A Mr. Hager says, Does not require upgrade to any
22 other technology, applications or any other Lawson
23 components. Delivered via download, which takes about
24 20 minutes. Straightforward installation that most
25 companies typically do themselves, but we are happy to

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1 do it for no fee. Installation takes a couple of
2 hours. Configuration varies a bit but typically will
3 be completed in a day or two. Again, done by us at no
4 fee.

5 User training can be done electronically and would
6 be estimated as an hour or two of information for
7 users. And skipping to the last bullet point.

8 Effort level can be thought of as a maintenance
9 release effort, but only changes to the requisition
10 center. Nothing is -- nothing in core Lawson.

11 MR. THOMASCH: Your Honor, might I just
12 object and ask that the one paragraph, one line that
13 was skipped over, be read under the rule of
14 completeness, Rule 106?

15 MS. ALBERT: I have no objection to that.

16 THE COURT: All right.

17 THE WITNESS: So the bullet point next to the
18 last, "The wild card is in modifications and what
19 level of testing the customer requires, which is very
20 customer specific."

21 Q So what does this communication indicate to you
22 concerning any differences between the infringing
23 configurations with RSS and the configurations having
24 RQC?

25 THE COURT: It's not what it indicates to

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1 him. It's what if anything did it do in respect of
2 the shaping of his opinions. I think that's what the
3 pertinent question is. They are two different
4 questions entirely.

5 Is that why you rise, Mr. Thomasch?

6 MR. THOMASCH: That's part of why I rise.

7 THE COURT: I didn't mean to cut you off.

8 MR. THOMASCH: No, no, Your Honor. The other
9 part of why I rise is, for the record, there is no
10 foundation laid that this document relates in any way
11 to the change in functionality that is the subject of
12 this hearing. And, thus, to deal only with the
13 generality of RSS or RQC in light of the prior
14 proceedings that we've had here where we know that
15 there were changes made that were not proper for this
16 proceeding.

17 THE COURT: Is this a relevance objection?

18 MR. THOMASCH: It is, Your Honor.

19 THE COURT: All right. Is this document 1030
20 or Docket No. 1030 an agreed exhibit or not?

21 MS. ALBERT: Yes, it is, Your Honor.

22 THE COURT: Then objection overruled.

23 MS. ALBERT: Just for the record --

24 THE COURT: As to the admission of the
25 document, but not as to the question. The question

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1 still is defective.

2 BY MS. ALBERT:

3 Q What if anything impact does this communication
4 have upon your analysis of whether or not the
5 differences between the systems having RQC and the
6 infringing configurations with RSS are more than
7 colorably different?

8 A So this email exchange represents RQC as being a
9 maintenance patch. It clearly says that nothing in
10 core Lawson has changed. So the only changes are to
11 the user interface, not to the core functionality. So
12 this suggests minimal cosmetic changes to the user
13 interface.

14 THE COURT: What is a maintenance patch?

15 THE WITNESS: Typically, it's a code change
16 that gets downloaded and installed.

17 BY MS. ALBERT:

18 Q What's the difference between a maintenance patch
19 and a new release?

20 A A maintenance patch is simple. A new release is
21 complex.

22 Q What's the date of Mr. Hager's email?

23 A May 26, 2011.

24 Q What's the subject line in Mr. Hager's email?

25 A "Update on requisition center and Punchout -

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1 Sutter."

2 Q Do you know whether or not any of the changes
3 relevant to this proceeding were implemented in
4 requisition center as of the date May 26, 2011?

5 A Yes.

6 Q Which change?

7 A The -- I've drawn a blank.

8 Q Was the change relating to requisitioning with
9 item master items and Punchout items implemented as of
10 May 26, 2011?

11 A In the RQC release, yes.

12 Q Thank you. Let's turn, if we could, to
13 Plaintiff's Exhibit 1072. Did you review this exhibit
14 in connection with your colorability analysis?

15 A Yes, I did.

16 Q What is it?

17 A So this is yet another email string, this time
18 concerning customers who have questions about testing.

19 Q Let's look at the earliest email in time on RQC
20 14104 from Mr. Walter's of Lawson where he indicates,
21 "Scott, some customers are concerned about the
22 retesting investment they need to make with the change
23 to RQC. I know you stated it is minimal. Is there
24 talking points or recommendations on how to diffuse
25 this concern with customers you can send me?"

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1 Do you see that question?

2 A Yes, I do.

3 Q How did Mr. Hanson respond to those concerns?

4 A He said, While this is a new product, the new
5 product is a change to the user interface only. The
6 procurement business functionality and data remains
7 the same. If a user uses RSS already, they'll
8 intuitively be able to use the RQC product. There is
9 very little change in the functionality.

10 Q How did Mr. Walter's respond then to Mr. Hanson?

11 A He then asks another question. "What is our
12 guidance on testing understanding it is just a change
13 to the user interface?"

14 Q What further guidance did Mr. Hanson provide to
15 Mr. Walters on testing understanding that RQC was just
16 a change to the user interface?

17 A He replied, "For the risk averse, perform any
18 tests that would have normally been performed with
19 deploying RSS or patching RSS. For the non-risk
20 takers, test what is changed, which is really
21 nothing."

22 Q How does this communication impact upon your
23 analysis of whether the configurations having RQC,
24 whether or not those are more than colorably different
25 from the infringing configurations?

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1 A In my opinion, it's a very powerful statement to
2 say that you don't need testing of what is purportedly
3 a new product. So that indicates to me that RQC is
4 very similar to RSS. So it's very similar to the
5 systems that have already been installed.

6 MS. ALBERT: Your Honor, I would move the
7 admission of Plaintiff's Exhibit 1072.

8 THE COURT: Any objection?

9 MR. THOMASCH: No, Your Honor.

10 THE COURT: Admitted.

11 (Plaintiff's Exhibit 1072 is admitted.)

12 BY MS. ALBERT:

13 Q Let's turn to Plaintiff's Exhibit 1027. Did you
14 review this exhibit in connection with your
15 colorability analysis?

16 A Yes, I did.

17 Q What is it?

18 A It's a communication between Mindy Klebe of Lawson
19 and Aaron Drury of Providence Health where they're
20 discussing RQC.

21 Q How does Mindy Klebe describe RQC to Mr. Drury of
22 Providence Health?

23 A She says in the first two lines, Hey, didn't mean
24 to imply that it's RQC. It's not. It's really the
25 same thing as RSS XML was except for a few

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1 adjustments; however, I'm not allowed to say that.

2 Q So what if any impact does this communication have
3 upon your analysis of whether or not the
4 configurations having RQC are more than colorably
5 different from the infringing configurations?

6 A So this clearly indicates that Mindy Klebe told
7 this Lawson client, Aaron Drury of Providence Health,
8 that RQC was really the same thing as RSS.

9 MS. ALBERT: Your Honor I would move the
10 admission of Plaintiff's Exhibit 1027.

11 MR. THOMASCH: Objection, Your Honor. Lack
12 of foundation, hearsay. It is on our objection list.
13 It is not --

14 THE COURT: The objection is what? Hearsay?

15 MR. THOMASCH: Hearsay and relevance, Your
16 Honor.

17 THE COURT: All right.

18 MS. ALBERT: It's relate to show how Lawson
19 itself characterizes the difference between RQC and
20 RSS. And, again, I would submit that it's a
21 nonhearsay admission of a party under Rule
22 801(d)(2)(D). Mindy Klebe has responsibility for
23 customer support and this is in the scope of her
24 employment to communicate to a customer concerning
25 concerns they had about RQC.

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1 THE COURT: Overruled.

2 BY MS. ALBERT:

3 Q Let's turn to Plaintiff's Exhibit 1066. Did you
4 review this exhibit in connection with your
5 colorability analysis?

6 A Yes, I did.

7 Q What is it?

8 A This is internal communications between Lawson
9 employees concerning a question that they had received
10 from one of their customers named Heartland.

11 Q In the earliest email in time on the bottom of the
12 page from James Healey to Scott Hanson, Mr. Healey
13 indicates, "I need to install RQC on their new box.
14 Can we upgrade data from RSS to RQC?" Do you see that
15 question?

16 A Yes, I do.

17 Q How did Scott Hanson respond to Mr. Healey's
18 question?

19 A Mr. Hanson answered, "There is no data migration.
20 RSS and RQC are just two UIs," user interfaces, "that
21 point to the same requisition data. Think of it like
22 using, IE, Internet Explorer versus Firefox to hit
23 access a website."

24 Q How does this communication impact upon your
25 opinion as to whether or not the systems having RQC

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1 are more than colorably different from those found to
2 be infringing?

3 MR. THOMASCH: Objection. Relevance, Your
4 Honor.

5 THE COURT: Overruled.

6 A So this confirms my opinion that if there is going
7 to be no data migration, then RQC and RSS are using
8 exactly the same databases. So, again, the change
9 from RSS to RQC is just confined to the user
10 interface, not to any core functionality of the
11 procurement system.

12 Q Let's look at Plaintiff's Exhibit 1065.

13 MS. ALBERT: Oh, I guess I would move the
14 admission of Plaintiff's Exhibit 1066.

15 THE COURT: Any objection?

16 MR. THOMASCH: No objection.

17 THE COURT: It's admitted.

18 (Plaintiff's Exhibit 1066 is admitted.)

19 Q Now, referring to Exhibit 1065, did you also
20 consider this exhibit in connection with your
21 colorability analysis?

22 A Yes, I did.

23 Q What is it?

24 A This is more email this time concerning questions
25 that Lawson's customer Kennedy Health had concerning

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1 Lawson's RQC SWAT team.

2 Q How did Scott Hanson respond to Wendy Schulte's
3 question, "So when you say we will be happy to work
4 with Kennedy Health to do their production RQC
5 install, if necessary, billable or the non-bill for
6 conversion?"

7 A So Mr. Hanson's answer was: "We do the install
8 for no charge. That's what the whole RQC SOF is
9 about. There is no conversion necessary. RQC is just
10 a new user interface to access their requisition
11 functionality. Think of it as they used to access the
12 Internet, [read: Requisitions] via Internet Explorer
13 on their PC [read: RSS]. What we are now saying is
14 you cannot use IE any longer, and instead have to use
15 Firefox. So, Lawson is offering to install Firefox
16 [RQC] on their PC's, to use instead of IE [read: old
17 RSS] to access the Internet [read: their existing and
18 new requisitions]. There is no requirement to
19 "convert" a requisition. A requisition is a
20 requisition. We are just providing a new utility to
21 view that requisition."

22 Q How does this communication between the Lawson
23 employees impact upon your analysis as to whether or
24 not the configurations having RQC are or are not more
25 than colorably different from the infringing

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1 configurations?

2 MR. THOMASCH: Objection. Relevance.

3 THE COURT: What's that?

4 MR. THOMASCH: Objection. Relevance, Your
5 Honor.

6 THE COURT: Overruled.

7 A So here we see that Lawson personnel are once
8 again showing in their communications that they view
9 the differences between RQC and RSS to be minimal with
10 no real functional differences. The changes are to
11 the user interface only and not to the core
12 functionality. So the changes made to the infringing
13 systems with the release of the new RQC, in my
14 opinion, were not more than colorable differences.

15 THE COURT: I guess I have a question I'm
16 trying to sort out here. What is the significance in
17 your opinion of the distinction you're drawing between
18 a change in functionality and change in user
19 interface? That obviously means something to you, but
20 what does it mean?

21 THE WITNESS: Yes, sir.

22 THE COURT: It's technical jargon that I need
23 to understand better, if you'll help me.

24 THE WITNESS: Yes, Your Honor. When I'm
25 talking about the functionality, I'm talking about the

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1 core functionality of the Lawson system that enables
2 procurement. With regard to Claim 26 it's what are
3 the functionalities that map from the Lawson system to
4 maintaining a database of at least two product
5 catalogs, being able to search the catalogs, being
6 able to select items from the catalogs, being able to
7 build a requisition from the selected items, and being
8 able to generate one or more purchase orders for those
9 items. That's the functionality.

10 What has come out during my entire testimony
11 is perhaps confusion that ePlus had never accused RSS
12 of infringement. It was the infringing systems,
13 Configurations 3 and 5, were RSS and all of those
14 other modules that I had on my demonstrative.

15 So in my opinion when Lawson replaced RSS
16 with RQC, they changed the one program that changed
17 the view of the data.

18 THE COURT: That's the user interface?

19 THE WITNESS: Yes, sir. So they changed the
20 user interface, but they didn't change any of the core
21 functionality. And so for my colorability analysis,
22 I'm going back to the fact that random changes don't
23 apply to my colorability analysis. Only those that
24 are relevant to the elements of the claim.

25 THE COURT: All right.

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1 MR. THOMASCH: Your Honor, just for the
2 record, in light of that explanation, we would move to
3 strike all of the testimony that Mr. Weaver has given
4 with respect to the way he is defining core
5 functionality versus user interface as irrelevant and
6 patently outside the TiVo analysis by his own
7 statement.

8 MS. ALBERT: I don't believe that it's
9 outside of the TiVo analysis. The TiVo analysis says
10 as an initial hurdle, you have to consider whether the
11 modification that was made to the infringing systems
12 has any relevance to the features that were relied
13 upon to prove infringement. A random change that
14 isn't related to any claim element as a matter of law
15 cannot be more than a colorable difference. So Dr.
16 Weaver is pointing out that the features that related
17 to the procurement functionality that are relevant to
18 the claim are based on the underlying modules of the
19 system and not based on the user interface.

20 THE COURT: Overruled. Tell me something,
21 both of you, please. Is there something that I've
22 missed about the meaning of the word "random" that
23 gives it some special meaning in the patent law?

24 MR. THOMASCH: No, absolutely not.

25 THE COURT: It's just an ill-chosen word that

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1 doesn't really mean anything. What it refers to is
2 changes that aren't pertinent to what is in the patent
3 or what is accused as being modified or what is
4 accused as infringing an element. It doesn't have any
5 independent meaning, does it? Everybody is adopting
6 "random" as if it means something.

7 MS. ALBERT: No.

8 THE COURT: I feel like that we'd be just as
9 well off if that word were out of the quotation.

10 MR. THOMASCH: Your Honor, the word is in the
11 quotation.

12 THE COURT: It is.

13 MR. THOMASCH: We think it is important.

14 THE COURT: Why is it important then? Help
15 me with it.

16 MR. THOMASCH: Yes, Your Honor. Because I
17 believe that the articulation that Your Honor gave is
18 not faithful to TiVo. It is not a question of what is
19 relevant to the modified product's infringement. What
20 the issue is is whether or not the subject, the
21 modification, relates to what was contended and proved
22 at the first trial.

23 THE COURT: Let me see the quote that has the
24 "random" in it. I may have opened Pandora's box. I
25 don't know what I've done with my thumb-worn copy of

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1 TiVo.

2 MR. THOMASCH: Your Honor, I can read it to
3 you or hand it up.

4 THE COURT: Hand it to me. Let me see it.

5 MR. THOMASCH: It begins on the lower
6 left-hand part of page 882, which is page 14 of the
7 Westlaw for counsel's sake.

8 THE COURT: All right. Well, you-all are
9 also taking "random" out of context from the way the
10 Federal Circuit used it. It says, "The analysis must
11 focus not on the differences between the randomly
12 chosen features of the product found to infringe in
13 the earlier infringement trial and the newly accused
14 product, but on those aspects of the accused product
15 that were previously alleged to be and were a basis
16 for the prior finding of infringement and the modified
17 features of the newly accused products. Specifically,
18 one should focus on those elements of the adjudged
19 infringing products that the patentee previously
20 contended and proved but satisfied specific
21 limitations of the asserted claims."

22 That's what I was trying to say in short form
23 and I butchered it when saying it. But the randomly
24 chosen, the word "randomly" just basically means you
25 can't go out and choose some feature and say, It's

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1 different. The issue is whether it was a feature that
2 was involved in the infringement, I think. So
3 anyway --

4 MR. THOMASCH: Your Honor, can I just make
5 clear on the record --

6 THE COURT: No. You've already made clear on
7 the record so many times. Make it quickly, if you
8 will, Mr. Thomasch. I understand, I think. So you'll
9 have it in the record right here.

10 MR. THOMASCH: Yes, Your Honor. We may not
11 pick a randomly chosen feature and say we changed it.
12 It is our obligation as we set forth what changes
13 matter, and there were many changes, but when we
14 identify what changes matter, the question is: What
15 does that have to link up to? And I think there are
16 two very different schools of thought.

17 The plaintiffs say the question is whether
18 what you changed takes you out of infringement. Does
19 your modified product still practice the claims --

20 THE COURT: No, they don't. They say, Does
21 it colorably change what was proved to be infringed?

22 MR. THOMASCH: This analysis takes us back
23 twice. This analysis takes us back to what was
24 contended and proved at the first trial. And what was
25 contended and proved at the first trial about the

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1 features that we changed are what we think --

2 THE COURT: I understand, Mr. Thomasch.
3 You're going to have a chance to take up with the
4 Federal Circuit exactly whether your interpretation is
5 right or not. And you've preserved it seven ways from
6 Sunday, I think. And it isn't as if I don't
7 understand it. I just don't think it's correct. I
8 understand what you're saying.

9 MR. THOMASCH: All right. And I would just
10 note that that, of course, is directly related to the
11 part of TiVo that I showed during opening statement
12 that relates to the manner in which the very TiVo
13 analysis was done looking only at the changed
14 features, not at the entire product that was at issue.

15 THE COURT: That doesn't mean that that's all
16 you can consider. What you're doing is saying that
17 the only thing you can consider in coming to judgment
18 is that evidence even if there's plenty of other
19 evidence that relates to it that helps inform what
20 that evidence means. And that's what they're doing is
21 putting in the evidence that puts the context to
22 what's going on. And that's what's happening.

23 At least that's what I see as happening.
24 That's what their papers say. And you-all are at odds
25 over it. And I think their approach is correct and

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1 yours is not. But you've made it clear that that's
2 what you think is right. And I'm sure the Federal
3 Circuit will have the opportunity to decide which is
4 the correct view.

5 MR. THOMASCH: Thank you, Your Honor.

6 MS. ALBERT: I think I have the question
7 pending.

8 THE COURT: If you do, you have to ask it
9 again.

10 BY MS. ALBERT: (Continuing)

11 Q How does the communications in Plaintiff's Exhibit
12 1065, how do those impact upon your analysis of
13 whether or not the changes that were brought by the
14 configurations having requisition center render those
15 configurations more than colorably different from the
16 infringing configurations?

17 A The documentation that we have here I think shows
18 conclusively that Lawson personnel see or view the
19 differences between RQC and RSS to be very minimal, to
20 be changes to the user interface only with no change
21 to the core functionality of the procurement system.
22 So the changes made to the infringing systems by the
23 release of RQC, in my opinion, are not more than
24 colorably different.

25 Q Just point out for the record, what are the dates

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1 on the emails in Plaintiff's Exhibit 1065?

2 A September 1, 2011.

3 Q Do you know whether or not the changes that are at
4 issue here relating to requisitions with Punchout
5 items were implemented prior to September 1, 2011?

6 A Yes, they were.

7 THE COURT: Let me make clear here, we don't
8 have a jury, and there wasn't any real objection to
9 that answer, but it isn't how he interprets what the
10 Lawson people think that really informs his opinion
11 that that is -- he can testify that it informs his
12 opinion if their text explains a technical term that I
13 need to understand. I can understand what they mean
14 when they say "There's no lipstick on a pig" or
15 whatever it is. I just use that as an example. In
16 fact, they point out that that didn't even relate to
17 the change at issue. It related to something else
18 anyway. I use that only as an example.

19 But if he says, "Mary said there's no
20 lipstick on a pig, and therefore you don't have to do
21 this," then the important part of what his
22 interpretation has to be is what is the meaning of
23 "you don't have to do this"? Do you understand what I
24 am saying?

25 MS. ALBERT: Yes, Your Honor.

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1 THE COURT: That's where he is helpful to the
2 trier of fact, not in interpreting the plain language
3 and everyday vernacular of the Lawson people in making
4 the statements of which you-all are so fond. I can
5 deal with those on my own and draw inferences in that
6 way, but it helps me if I understand what it is that
7 the witness thinks is important about the statement,
8 for example, what we're now saying is that you can't
9 use IE any longer and instead have to use Firefox. So
10 Lawson is offering to install Firefox [read: RQC] on
11 their PCs to use instead of IE [read: old RSS] to
12 access the Internet [read: their existing and new
13 requisitions].

14 That has a lot of technical terms in there
15 that would be helpful to have him interpret. And
16 that's what his office is. Not to take the plain
17 language and give me an interpretation of that.

18 If you want to ask him that, you can ask him
19 that. I'm not going to pay any real attention, I
20 don't think, to his interpretation of the nontechnical
21 terms used in the communications that we're dealing
22 with because I don't think that's really what his
23 opinion is based on. His opinion's got to be based on
24 what the technical aspects of the communications are.

25 MR. THOMASCH: Objection. I would just note,

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1 Your Honor, that he has actually repeatedly said that
2 his opinion is based on the nontechnical, and we
3 believe that is a reason why it needs to be struck as
4 not proper expert testimony. It is his testimony that
5 that is the basis.

6 THE COURT: Well, actually, I've been
7 listening quite carefully, Mr. Thomasch, to what he
8 has been saying, and every time she's called upon him
9 to deal with the opinion, she has, in fact, linked it
10 to some component that I need help on, and he has
11 answered in that way, but in this instance he did not
12 do that, which is why I raised it.

13 So your objection is overruled to the extent
14 it reaches backwards and I've already dealt with it.
15 We'll strike the answer and let you start again on
16 this document, if you'd like to.

17 BY MS. ALBERT:

18 Q What is important about the statements that
19 Mr. Hanson made about the differences between RQC and
20 RSS that are relevant to the analysis the Court has to
21 make about the colorability issue?

22 THE COURT: That are relevant to your opinion
23 about why the change is not more than colorably
24 different.

25 MS. ALBERT: Thank you, Your Honor.

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1 THE COURT: That is, I think, what you
2 intended to say.

3 BY MS. ALBERT:

4 Q What is important about the statements that
5 Mr. Hanson made here about the differences between RQC
6 and RSS that is important to your opinion that the
7 changes that were made via RQC rendered the systems no
8 more than colorably different from the infringing
9 configurations?

10 A Okay. Let's remove all the highlighting. So this
11 statement, "There is no conversion necessary," that
12 says that RQC is using the same data as RSS.

13 THE COURT: Using the same data --

14 THE WITNESS: Data in the procurement system.

15 THE COURT: Using the same data.

16 THE WITNESS: Right.

17 THE COURT: All right.

18 A So given that that is true, the next statement,
19 "RQC is just a new user interface to access the
20 requisition functionality." So this is saying that
21 the user interface, which is the view of the data,
22 that's what's new. Just the user interface. Nothing
23 is said here about core functionality changes.
24 There's no requirement to convert a requisition. So
25 requisitions are not different in RSS and RQC.

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1 So, in my opinion, the changes from RSS to RQC are
2 minimal and cosmetic, not related to the core
3 functionality.

4 THE COURT: That kind of testimony is helpful
5 to my understanding of your view.

6 BY MS. ALBERT:

7 Q What about the statement that he makes about what
8 we are now saying is that you cannot use IE any longer
9 and instead have to use Firefox? How is that relevant
10 to your opinions about lack of colorable difference
11 between the configurations having RQC and the
12 infringing configuration?

13 A That you could have used -- you could have and did
14 use Internet Explorer. That was RSS. But now you
15 have to use Firefox, that's RQC. But they are
16 interchangeable.

17 Q Are Internet Explorer and Firefox user interfaces?

18 A No, they are complete browser systems.

19 MS. ALBERT: I don't think I've moved the
20 admission of Plaintiff's Exhibit 1065 into evidence.
21 I'd like to do so.

22 THE COURT: Any objection?

23 MR. THOMASCH: No objection, Your Honor.

24 THE COURT: It's admitted.

25 (Plaintiff's Exhibit No. 1065 is admitted.)

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1 MS. ALBERT: Just for housekeeping, I am not
2 sure if I moved the admission of Plaintiff's Exhibit
3 1269 into evidence. That was the interrogatory
4 answers. And I would like to do that.

5 THE COURT: You did not.

6 MS. ALBERT: I would like to do that.

7 THE COURT: Any objection?

8 MR. THOMASCH: No objection, Your Honor.

9 THE COURT: It is admitted.

10 (Plaintiff's Exhibit 1269 is admitted.)

11 THE CLERK: What about 1032?

12 THE COURT: 1032?

13 THE CLERK: 1032, Your Honor. Is that
14 admitted?

15 THE COURT: I don't know where it was even
16 asked about. I write them down. No, it's not
17 admitted. Changes brought -- no. 1032 is not
18 admitted yet.

19 THE CLERK: That's what I have. Thank you.

20 BY MS. ALBERT:

21 Q Dr. Weaver, did you review any documents relating
22 to whether or not new training was required for RQC?

23 A Yes, I did.

24 Q Let's look at Plaintiff's Exhibit 1057. What is
25 this exhibit?

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1 THE COURT: What number, Ms. Albert?

2 MS. ALBERT: 1057.

3 THE COURT: All right. Excuse me.

4 A So this is an email that contains an attachment
5 and in the attachment are the questions and answers
6 from an RQC webinar where once the questions and
7 answers have been printed, they have then been updated
8 by the RQC SWAT team, and this email is distributing
9 that updated question and answer list.

10 Q What was the RQC SWAT team?

11 A These are Lawson personnel whose job was to assist
12 customers with the installation of RQC.

13 Q Let's look at page 20 of the attachment with the
14 questions and answers. How did Lawson respond to the
15 customer's question at line 204, "What are some of the
16 end user training issues that we should be aware of?"

17 THE COURT: Line what?

18 MS. ALBERT: Line 204.

19 Q How did Lawson respond to that question?

20 A Their answer was, "Since RQC has 100 percent of
21 the existing functionality of RSS, no training issues
22 have been identified to date."

23 Q So what is important about that statement to your
24 opinions about lack of colorable difference?

25 A Lawson is telling its customers that RQC has

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1 100 percent of the functionality of RSS. So there's
2 nothing new, so there's no new training required.

3 MR. THOMASCH: Objection to form, Your Honor,
4 to the addition of the words "there's nothing new."
5 He read the document. He inserted an editorial.

6 THE COURT: Objection to the response to the
7 question, is that what you're saying?

8 MR. THOMASCH: Yes.

9 THE COURT: Is your objection to the
10 response?

11 MR. THOMASCH: It is actually, Your Honor.
12 The objection --

13 THE COURT: Sustained. He misread the
14 response. So do you want to read it again, Doctor?

15 THE WITNESS: Lawson is telling its customers
16 that RQC has 100 percent of the functionality of RSS
17 and so no new training is needed.

18 Q So what's the significance to the statement that
19 no new training is needed from a computer science
20 point of view with respect to whether or not the
21 systems having RQC are or are not more than colorably
22 different from the infringing configurations?

23 A If no new training is needed, then there must not
24 be much difference between the systems. In this case,
25 RSS and RQC.

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1 MS. ALBERT: Your Honor, I would move the
2 admission of Plaintiff's Exhibit 1057.

3 THE COURT: Any objection?

4 MR. THOMASCH: No objection, Your Honor.

5 THE COURT: It's admitted.

6 (Plaintiff's Exhibit 1057 is admitted.)

7 Q Let's look at Plaintiff's Exhibit 1070. Did you
8 consider this exhibit in connection with your
9 colorability opinions?

10 A Yes, I did.

11 Q What is it?

12 A This is an email from Scott Hanson relating to the
13 question of RQC training.

14 Q Let's look at the earliest email in time on page
15 RQC 19870. Do you see the question there from
16 Christopher Milliner of Lawson, "What can we expect
17 from our requisition center (RQC install)? What have
18 other customers done around differences training for
19 their requesters?" Do you see that?

20 A Yes, I do.

21 Q How did Mr. Hanson respond to that question?

22 A Just above is Mr. Hanson's response. "We will
23 assist them in installing RQC. As for training, it
24 varies, but generally minimal, if any, retraining is
25 necessary."

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1 Q What's important about that statement to your
2 opinion about lack of colorable difference?

3 A If RQC requires minimal or no retraining, then RQC
4 must be very similar to RSS.

5 Q Let's look at Plaintiff's Exhibit 1110.

6 MS. ALBERT: Oh, also I forgot to move the
7 admission of Plaintiff's Exhibit 1070.

8 THE COURT: Any objection?

9 MR. THOMASCH: No objection, Your Honor.

10 THE COURT: It's admitted.

11 (Plaintiff's Exhibit No. 1070 is admitted.)

12 Q Can you note the date of Plaintiff's Exhibit 1070?

13 A That date was September 21, 2011.

14 Q Was that date before or after the changes that are
15 at issue here with respect to requisitioning with
16 Punchout items?

17 A That was after.

18 Q Let's look at Plaintiff's Exhibit 1110. What is
19 this exhibit?

20 A This is more email. This time it includes a
21 preview of an announcement to account executives that
22 provided some questions about RQC training issues.

23 Q In the middle email from Michael Poling, what was
24 his question that he expressed there?

25 A He says, "All: I'm concerned that introducing

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1 requisition center as 'new product' will put us in a
2 position that we have to demonstrate the new
3 capabilities or differences. Does it have to be a new
4 product or can it be a replacement?"

5 Q How did Jennifer Langer respond to that?

6 A In the email just above, "There is a change to the
7 UI, but the menu structure is essentially the same.
8 We do have a PowerPoint showing the UI changes and it
9 will be available in the launch toolkit. This can be
10 used with prospects to show the changes."

11 Q UI, what's that mean?

12 A That's user interface.

13 Q How did Dean Hager respond to Michael Poling's
14 concern?

15 A He said, "No new training should be needed. And
16 re-demoing shouldn't be needed."

17 Q So what is important about these statements that
18 were made in this exhibit to your opinions about lack
19 of colorable difference?

20 A In my opinion, if no retraining is going to be
21 required, if no training is going to be required, then
22 the functionality of RQC has to be very similar to
23 that of RSS.

24 THE COURT: Did you think maybe I wasn't
25 paying attention the first two or three times you-all

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1 made that point?

2 BY MS. ALBERT:

3 Q Based on your review of Lawson's technical
4 documentation, its internal and external
5 communications, the testimony of Lawson's witnesses,
6 and your review of the systems, do you have an opinion
7 as to whether or not the change Lawson made to prevent
8 items selected from a Punchout site from appearing on
9 the same requisition as item master items or items
10 from a different Punchout site renders the
11 configurations with RQC more than colorably different
12 from the infringing Configurations 3 and 5?

13 A I believe that they are not more than colorably
14 different.

15 Q What are the bases for your opinion?

16 A First, the changes that have been made are not
17 related to any claim element in Claim 26.

18 Second, there are no changes to any other module
19 other than RSS. No changes to inventory control or
20 requisition or purchase order or Punchout or EDI.

21 So there have been no changes to the capabilities
22 regarding the use of catalogs, of selecting a catalog
23 to search, of selecting items in the catalog to put in
24 a requisition, of building a requisition, of
25 generating a purchase order from the requisition, no

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1 changes to inventory determination and Punchout or
2 EDI.

3 And lastly, as we've seen, Lawson's internal
4 communications continually characterize the changes as
5 minimal with no retraining needed.

6 MS. ALBERT: Thank you, Dr. Weaver. I have
7 no further questions. Please answer any questions
8 that Mr. Thomasch may have.

9 THE WITNESS: Certainly.

10

11 RECROSS-EXAMINATION

12 BY MR. THOMASCH:

13 Q Good afternoon, Dr. Weaver.

14 A Good afternoon, Mr. Thomasch.

15 Q Right at the outset of your examination you were
16 asked by counsel about what you were asked to analyze
17 in this case. Do you recall that?

18 A I do.

19 Q If I heard you correctly you said whether the
20 changes made, and then you corrected yourself and said
21 whether the systems made are more than colorably
22 different. Do you recall that?

23 A Well, I don't recall every word.

24 Q But you recall that you actually changed from "the
25 changes made" to "the system made," don't you?

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1 A No.

2 Q You don't?

3 A No.

4 Q Which is it that is the basis for your opinion,
5 that the changes made or that the systems are not more
6 than colorably different?

7 A It's the changes. Are the changes more than
8 colorably different.

9 Q Did you compare just the changes in isolation, the
10 infringing part of the system, to that which had been
11 changed?

12 A I was comparing the operation of the system with
13 RQC versus the system with RSS.

14 Q And there are many parts of the overall
15 Configuration 3 and 5 that can be used and not
16 infringe Claim 26, correct?

17 A Well, I suppose parts could be used in isolation
18 and not infringe, that's right.

19 Q You understand, don't you, that Configuration 3 is
20 the same as Configuration 2 but includes the Punchout
21 module?

22 A Yes, that's correct.

23 Q And you have shown that in your drawings, correct?

24 MS. ALBERT: Beyond the scope. I didn't go
25 into Configuration No. 2.

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1 MR. THOMASCH: I'm just trying to identify
2 what the subject matter of the witness --

3 THE COURT: Overruled.

4 THE WITNESS: Please repeat the question.

5 Q Configuration 3 is identical to Configuration 2
6 except the Configuration 3 includes Punchout, correct?

7 A That's correct.

8 Q In the trial of this action, it was not even
9 alleged that Configuration 2 infringed Claim 26, was
10 it, sir?

11 A That's correct.

12 MS. ALBERT: Beyond the scope, Your Honor,
13 and also we're delving into the trial.

14 THE COURT: Now you are. Objection
15 sustained.

16 MR. THOMASCH: May I have Slide 1, please?

17 THE COURT: What are we doing here?

18 MR. THOMASCH: I'm sorry, Your Honor. I'm
19 trying to pull up a slide to ask a question.

20 THE COURT: Whose slides?

21 MR. THOMASCH: It was our --

22 THE COURT: On your side or their side?

23 MR. THOMASCH: Our slide from --

24 THE COURT: Okay.

25 BY MR. THOMASCH:

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1 Q Dr. Weaver, you were not here for opening, were
2 you?

3 A No, sir, I was not.

4 Q Okay. I want to show you something that I showed
5 to the Court just to identify what it is that is the
6 change and see if we're in agreement about the nature
7 of the change as opposed to the significance of the
8 change. All right?

9 A Okay.

10 Q So do you understand that the change in the
11 functionality of Punchout was indeed a two-part
12 change?

13 A Please explain that.

14 Q Let me ask you to read with me and see if you
15 understand whether this is part of the overall change
16 in functionality to Punchout. Is it, in fact, your
17 understanding, Dr. Weaver, that when using the
18 modified products, a Lawson customer who has searched
19 for and selected a matching item or items from item
20 master cannot access a Punchout vendor's website
21 during that shopping session; is that correct?

22 A That's correct.

23 Q Is it also correct, sir, that if a shopping
24 session starts with a search and selection of one or
25 more items from a Punchout vendor's website, the

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1 customer cannot then access item master; is that a
2 factually correct statement?

3 A It is.

4 Q Is it true, sir, that the redesigned product
5 prevents a user from selecting and combining items
6 from both item master and a Punchout vendor's website
7 on a single requisition? Is that true?

8 A Yes, that's true.

9 Q Was that functionality available? Was it a
10 feature of the infringing configurations?

11 A It was a feature, but, of course, it was not the
12 only feature.

13 Q I asked you: Was it a feature of the infringing
14 configurations?

15 A It was.

16 Q The next slide, please.

17 Is it true, Dr. Weaver, that when using the
18 modified products, a Lawson customer who has searched
19 and selected an item from one Punchout vendor's
20 website cannot access a second Punchout vendor's
21 website and, thus, cannot search and select items from
22 more than one Punchout vendor's website in a shopping
23 session? Is that an accurate statement?

24 A It is.

25 Q Is it further true, Dr. Weaver, that the

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1 redesigned product prevents a user from selecting and
2 combining items from different Punchout vendors'
3 websites on a single requisition? Is that true?

4 A That is.

5 Q Was that functionality present in the infringing
6 configurations?

7 A It was. So were other functionalities.

8 Q So when counsel talked about changes we contend or
9 Lawson contends to be made, the changes that I would
10 like to discuss with you are these that we have just
11 identified. Is that clear?

12 A Yes, sir.

13 Q And am I correct that you do not dispute that
14 those changes were made?

15 A Those changes were made.

16 Q In RSS, a user could add all items from one
17 requisition, could add all items onto one requisition
18 regardless of the source; is that correct?

19 A Yes.

20 Q For example, if you started by punching out to a
21 Staple's Punchout site, you could search for a desk,
22 select a desk, and add a desk to the requisition,
23 correct?

24 A Correct.

25 Q You could then punch out to a Dell Punchout site,

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1 correct?

2 A Correct.

3 Q You could then search for and might ultimately
4 come upon a printer, you could select that printer and
5 add it to the requisition, correct?

6 A Correct.

7 Q Then you could go to checkout if you wished,
8 correct?

9 A Correct.

10 Q In RQC, that specific process cannot be performed;
11 is that correct?

12 A Correct.

13 Q In RQC under the modified product, you can start
14 by punching out to a Staple's Punchout site if, as a
15 customer, you have a Punchout link to Staples,
16 correct?

17 A Correct.

18 Q You can select a desk and add that to a
19 requisition in RQC, correct?

20 A Correct.

21 Q Then you could try to punch out to Dell. If you
22 tried to do so, will you be able to do so?

23 A No.

24 MR. THOMASCH: May I have Exhibit 1155,
25 please, called up.

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1 THE COURT: Plaintiff's Exhibit 1155?

2 MR. THOMASCH: Yes, Your Honor. I'm sorry
3 for not specifying.

4 Q Go to page 10 of the document Bates No. ending
5 with 718. Tell me when you have that in front of you.

6 A Yes, sir, I do.

7 Q This is something that you looked at during direct
8 examination, correct?

9 A Yes, it is.

10 Q It captions "Punchout items will be on separate
11 requisitions," and it shows a pop-up screen; is that
12 correct?

13 A Correct.

14 Q That's down in the lower right-hand corner where
15 there is some sort of triangular warning, and it says,
16 "Punchout items must be on a separate requisition," is
17 that right?

18 A That's correct.

19 Q Now, is that -- that's on the screen of the
20 computer of the user when the user tries to punch out
21 and go to Dell and buy something, correct?

22 A Well, not the screen as you've shown here. The
23 pop-up.

24 Q The pop-up would be?

25 A The pop-up would be.

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1 THE COURT: Excuse me. You're now continuing
2 with the situation in which you've gone to Staples,
3 punched out, ordered a desk, and now you want to go to
4 Dell and order a computer?

5 MR. THOMASCH: That is correct, Your Honor.

6 THE COURT: What happens is this pop-up comes
7 up. Is that what you're saying, Dr. Weaver?

8 THE WITNESS: I don't think that description
9 is correct, Your Honor. I think you've gone to item
10 master.

11 THE COURT: What?

12 Q In my example, you punch out to Staples Punchout
13 and you select a desk, and then you attempt to punch
14 out to Dell.

15 A I'm sorry, sir. That's not your example.

16 Q It's not the pop-up here?

17 A It's not the requisition line.

18 Q Okay. What will happen -- put aside the document
19 for the moment. What will happen if you punch out to
20 Staples, you select a desk, you add it to the
21 requisition, and you attempt to punch out to Dell?
22 What happens then?

23 A You'll get a pop-up like this one.

24 Q A pop-up like this one, correct?

25 A Correct.

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1 THE COURT: But the screen doesn't look like
2 what's at page 718; is that your point?

3 THE WITNESS: That's my point, Your Honor.

4 THE COURT: So the screen comes up with this,
5 "Punchout items must be on a separate requisition.
6 Click stop to return to your current position?

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: Then there's another one. Click
9 continue to create the new requisition.

10 THE WITNESS: That's correct.

11 THE COURT: If you click continue to create a
12 new requisition, what happens?

13 THE WITNESS: Then the requisition that you
14 currently are working on is abandoned.

15 THE COURT: Abandoned completely?

16 THE WITNESS: Yes, sir.

17 THE COURT: Not saved?

18 THE WITNESS: Not at all.

19 THE COURT: All right.

20 BY MR. THOMASCH:

21 Q Where is it -- how would you describe where it is
22 that you see at the pop-out? Is that on the user
23 interface?

24 A It's -- it is on the user's screen and it's
25 derived from the user interface code.

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1 Q When images are changed on the screen, do you call
2 that a change to the user interface?

3 A No.

4 Q Describe for me how you're using the term "user
5 interface".

6 A The user interface code and then what it can do
7 and can't do.

8 THE COURT: He is making a distinction
9 between user interface and user interface code, I
10 think.

11 MR. THOMASCH: I now hear that.

12 THE WITNESS: Correct, Your Honor.

13 Q What I want to find out is can you just disregard
14 this message and say, oh, I know I'm not supposed to
15 do that, but I would rather punch out to Dell and keep
16 what I've done from Staples?

17 A No.

18 Q So there's a physical blocking of what you've
19 done, correct? What you're trying to do? You're
20 blocked, you're thwarted from what you're trying to
21 do; is that right?

22 A If I understand your question, you have postulated
23 going to Staples, which is not what's shown on the
24 screen, but I accept --

25 THE COURT: Let's take that down from the

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1 screen because we're not talking about that anymore.
2 It's just confusing things. He's asking you a
3 question without reference to the exhibit.

4 MR. THOMASCH: Right.

5 THE COURT: So user goes on, goes to Staples,
6 selects a desk.

7 Q Puts it back onto the requisition and seeks to
8 punch out to Dell. Am I correct they will be blocked
9 from doing so?

10 A Yes.

11 Q It's not just that they get a message that this
12 isn't a good idea. They simply are incapable of now
13 carrying out that desired procurement; is that right?

14 A Well, there are two choices. You either abandon
15 the attempt to punch out to Dell and go back to the
16 requisition that you've got and release it, or if
17 you're going to keep your Staples requisition, then
18 you cannot punch out to Dell.

19 Q Okay. Hypothetically, let's just assume that
20 everyone agreed that you needed to have to be able, it
21 was critical that you be able to punch out to two
22 separate vendors, two separate vendors' websites, in
23 order to infringe the claim. If that were the
24 assumption, then would this be something that went to
25 core functionality in your view?

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1 MS. ALBERT: Objection, relevance.

2 MR. THOMASCH: Your Honor, I'm simply trying
3 to test the limits of the witness's opinion and
4 understand how he's using defined terms.

5 MS. ALBERT: That's not relevant to the
6 claim.

7 THE COURT: Was that in the claim
8 construction?

9 MR. THOMASCH: No. I am not suggesting that
10 that is required. I'm asking hypothetically so I can
11 understand -- I'm framing an example so I can
12 understand how he's using the term "core
13 functionality."

14 THE COURT: Well, if it doesn't relate to the
15 claim and the construction of the claim, I don't see
16 how it's relevant.

17 MR. THOMASCH: Because it is a hypothetical,
18 I'm not suggesting it is the actual fact. I'm asking
19 in a hypothetical.

20 THE COURT: I understand, but hypotheticals
21 have to be relevant or they are stricken by virtue of
22 403 and I'm afraid that's where we are.

23 So objection sustained.

24 BY MR. THOMASCH:

25 Q Let me ask you, Dr. Weaver, if a user of RQC and

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1 Punchout came upon a screen that gave them the choice
2 to stop and return to your current requisition or to
3 continue to a new requisition, in which case the other
4 was abandoned, do you think that message is clear to
5 the person who receives it?

6 A Yes.

7 Q Do you think that if that -- and that is a change
8 from what RSS was, correct?

9 A It is a change, but, as you know from my
10 testimony, I don't think it's related at all to Claim
11 26.

12 Q Could I ask you, if you can, if you understand my
13 question, to answer my question and not put an
14 argumentative statement at the end of it. Would that
15 be acceptable to you, sir?

16 A Yes, sir.

17 Q Recognizing that counsel for ePlus will have a
18 chance to follow-up and make sure there is nothing
19 unstated. Okay?

20 A Sure.

21 Q All right. So it is a change to have this
22 blockage in your ability to carry out the desired two
23 Punchout vendor websites requisition. That's a
24 change, correct?

25 A That's a change.

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1 Q Do you think any retraining of anyone would be
2 necessary if they knew how to use RSS, would any
3 training be necessary in order to be able to
4 understand and interpret this message?

5 A Probably not for that message.

6 Q Do you think that training would be necessary to
7 tell someone in light of that message that if they
8 want to go to Staples and then punch out to Dell, they
9 would have to do so in two separate shopping sessions,
10 not in one session? Do you think someone would need
11 to be retrained to understand that?

12 A It's probably understandable.

13 Q So whether or not the training is necessary does
14 not necessarily show you the significance of the
15 activity that is being thwarted; is that correct?

16 A Only true for your example.

17 Q But for my example, it is true?

18 A It is true for your example.

19 Q Now, in RSS, after going to Staples and to Dell,
20 if the Lawson customer had relationships with 98 other
21 Punchout vendors, they could go to 98 other Punchout
22 vendor websites and they could shop, choose whether or
23 not to select an item, and bring back as many of those
24 items from as many of those websites as they wanted,
25 and bring them back to the same requisition during the

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1 same shopping session; is that correct?

2 A During the same Lawson shopping session with
3 multiple Punchouts, multiple serial Punchouts.

4 Q Multiple serial Punchouts where the selected
5 matching items are brought back onto one requisition;
6 is that right?

7 A That's correct.

8 Q And then in those situations those different
9 sourced items would be on the same requisition, but
10 they would ultimately lead to different purchase
11 orders, correct?

12 A Correct.

13 Q As modified, RQC does not work the same way; is
14 that correct?

15 A Correct.

16 Q Now, that is a change in functionality; is it not?

17 A It's a change between RSS and RQC. It's not a
18 change to a core functionality.

19 Q I am not adopting the term "core functionality" as
20 it relates to patent claims. I am asking you, do you
21 understand my question when I am saying is it a change
22 in the functionality of the product as it concerns the
23 ability of a product user to use the product?

24 A It's a change in the way it works.

25 Q A change in the way it works?

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1 A (Nodded head.)

2 Q And that's not a cosmetic change, is it, sir?

3 A Yes.

4 Q Yes, it's not, or yes, it is?

5 A I think it's a cosmetic change.

6 Q It's a cosmetic change to go from being able to
7 shop at 100 different Punchout websites and bring it
8 back to one requisition or to have to do one, and if
9 you want to go to the next one, you need to either
10 finish or abandon the first? That's in your words
11 that's cosmetic?

12 A That's cosmetic because it's not related to the
13 claim.

14 Q It's cosmetic because no matter how severe the
15 difference is, it still infringes the claim in your
16 view; is that right?

17 A I was talking about colorable difference, not
18 infringement.

19 Q What I want to know is how is it that the ability
20 to go to 100 different sites for a purchasing
21 professional whose purchasing large volumes of
22 materials, how is it cosmetic for them to no longer be
23 able to go to 100 different places and bring that back
24 onto one requisition but need to do 100 separate
25 Punchout requisitions? Why is that cosmetic?

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1 A Because the end result of being able to purchase
2 those hundred things from a hundred sites, that
3 functionality is still present.

4 Q Is it more burdensome to have to do it with 100
5 separate requisitions?

6 A Yes, but that's not part of the claim.

7 Q Is it harder under the new Punchout with its
8 blockage limitations, is it harder to do comparison
9 shopping than it used to be?

10 MR. STRAPP: Object to the characterization
11 of new Punchout particularly where counsel stipulated
12 that Punchout hasn't been changed.

13 THE COURT: That's a fair point, isn't it?

14 MR. THOMASCH: When I refer to Punchout, I'm
15 referring to Punchout functionality.

16 Q Do you understand that?

17 A Okay.

18 Q And the Punchout functionality was due to coding
19 changes made in the process of moving from RSS to RQC
20 so that RQC relates to Punchout in a different way
21 than RSS did. Is that your understanding?

22 A No. The interface between RQC and Punchout is
23 identical to the interface, I'm talking about the code
24 as you are, from RSS to Punchout.

25 Q And the functionality of what can be accomplished

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1 during a single shopping session has changed between
2 the way that Punchout operated with RSS and the way
3 Punchout operated with RQC; is that correct?

4 A Yes.

5 Q Are you familiar with the use of electronic
6 requisition software to allow users to do comparison
7 shopping?

8 A Yes.

9 Q Is comparison shopping rendered more easy when you
10 have a system such as RSS that allowed multiple
11 different Punchout vendor website items to be brought
12 together on a single requisition than if you have to
13 go to one site and either have to abandon it or
14 complete it before going to the next?

15 MS. ALBERT: Relevance.

16 THE COURT: Overruled.

17 A I've forgotten which way you stated the question.

18 Q I want to know whether the shopping is easier when
19 you can use the single requisition and harder when you
20 have the hundred requisitions?

21 A That's correct, but not related to the claim.

22 Q The approval process you're familiar with, are you
23 not?

24 A Yes, sir.

25 Q And the approval process is the approval of a

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1 requisition which is a request to purchase from a
2 purchase order which is, in effect, a contract to
3 purchase; is that right?

4 A Correct.

5 Q So a different person in the requisition team for
6 a user company would be involved in approving the
7 requisitions; is that right?

8 MS. ALBERT: Relevance, Your Honor. There is
9 no claim element that relates to approval of a
10 requisition in Claim 26.

11 THE COURT: Is it? Did I misread it?

12 MR. THOMASCH: There is not an approval step
13 in the claim. There was specific discussion about the
14 approval process at the first trial in exactly this
15 situation.

16 MS. ALBERT: But it has no relevance to any
17 claim.

18 MR. THOMASCH: No, it doesn't have relevance
19 to the claim. It has relevance to the colorability of
20 the change that was described to the jury.

21 THE COURT: Excuse me. She's looking at
22 something.

23 MS. ALBERT: Your Honor said in your ruling
24 last week that we're not going to rehash the trial
25 testimony or explain what was shown at trial or

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1 summarize the arguments of counsel at trial in this
2 proceeding.

3 THE COURT: I don't think that's what he's
4 doing, but I also think the objection is well taken.
5 Sustained on relevance grounds.

6 BY MR. THOMASCH:

7 Q I'd like to ask you a few follow-up questions on
8 certain of the documents that you looked at on direct
9 examination, Dr. Weaver.

10 A Certainly.

11 Q Might I ask you to pull up PX-1002. Do you have
12 that?

13 A Yes, I do.

14 Q And you recognize that as questions and answers
15 that were taken down from a webinar on June 3, 2011?

16 A That's correct.

17 Q If you flip to page 650, I believe the third
18 question asks about, What about EDI? Do you recall
19 being questioned about that?

20 THE COURT: What page?

21 MR. THOMASCH: That is at page 13 of 18
22 ending in 650 on the Bate's number on the lower right.

23 THE COURT: Got you.

24 BY MR. THOMASCH:

25 Q Specifically, Dr. Weaver, I'm directing your

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1 attention to the third question on page 650 with
2 regard to EDI.

3 A Okay. I'm there.

4 Q Do you recall being asked about that question?

5 A I do.

6 Q When you went through this document, is that the
7 question that seemed most pertinent to you about
8 today's proceeding?

9 A It simply addressed the Configuration No. 5 that
10 had the EDI module and I wanted to show that it had no
11 changes.

12 Q And you understand that no changes to EDI are
13 alleged, correct?

14 A Yes.

15 Q You do understand that changes to the
16 functionality of Punchout are alleged, do you not?

17 A Yes.

18 MS. ALBERT: Objection.

19 Q If you would object your attention to page 651 --

20 MS. ALBERT: I just object to characterizing
21 that the changes were made to Punchout again.

22 THE COURT: He didn't say Punchout. He said
23 functionality of Punchout, I think.

24 MR. THOMASCH: I did, Your Honor, very
25 specifically.

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1 THE COURT: That changes your objection,
2 doesn't it, Ms. Albert?

3 MS. ALBERT: Yes.

4 THE COURT: All right.

5 BY MR. THOMASCH:

6 Q Do you see at the bottom of page ending in Bates
7 No. 651 and carrying over to the middle of page 652,
8 do you see a section called "procurement Punchout"?

9 A Yes.

10 Q Did you review those questions and answers?

11 A Yes.

12 Q Did you see the question at the top of page 652
13 with RSS, we were able to mix Punchout items with
14 stock items on a requisition. I've seen info that
15 suggests that is not possible with RQC. Is this
16 previous functionality of RSS likely to be restored to
17 RQC? Did you see that question?

18 A Yes.

19 Q Did you take from that, in the words of
20 plaintiff's counsel, the notion that at least this
21 customer felt that this was a loss of functionality
22 under RQC?

23 A From the point of view of that customer, yes.

24 Q So when the customer was talking about is it
25 likely to be restored, that's a suggestion that they

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1 wanted to know whether they are going to get
2 functionality that's been removed back in the future,
3 correct?

4 A Probably.

5 Q And going down to the fourth question, to you see
6 where it asks --

7 MR. THOMASCH: Page ending, counsel, 652,
8 top, fourth question. Are you okay?

9 MS. ALBERT: Uh-huh.

10 Q Dr. Weaver, fourth question on 652, read with me,
11 "Will the functionality be changed in the future so a
12 requisition can contain both Punchout and item master
13 items?" Do you see that?

14 A I do.

15 Q Does that suggest to you, again, that the
16 limitation on Punchout functionality was viewed as a
17 limitation by this customer?

18 MS. ALBERT: Calls for speculation.

19 THE COURT: Sustained.

20 BY MR. THOMASCH:

21 Q Did you consider these questions in any way in
22 reaching your expert opinion?

23 A Not the two that you pointed to.

24 Q Could I show you -- if you could pull up
25 Plaintiff's Exhibit 1010. Do you recognize that

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1 document from direct examination captioned,
2 "Introducing Lawson Requisition Center" dated June 3,
3 2011?

4 A Yes, I do.

5 Q I believe if you turn to page or the Bates No.
6 661, you'll see a page that you commented on during
7 your direct examination. Do you see that?

8 A Yes.

9 Q And it says that in the second bullet point
10 requisition center RQC is now generally available for
11 S3, correct?

12 A Correct.

13 Q And the next line which you focused on in your
14 direct examination and your answers to questions
15 during direct was designed to minimize impact on our
16 customers. Do you see that?

17 A I do.

18 Q Now, the changes to RSS to develop RQC that are
19 being discussed in this document go beyond the change
20 that relates to the functionality of Punchout, don't
21 they?

22 A Yes.

23 Q And there was a change that related to the manner
24 in which items that were initially selected would go
25 into the shopping cart on RSS, correct?

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1 MS. ALBERT: Beyond the scope of my
2 examination.

3 THE COURT: Well, I'm not sure. We'll wait
4 and see where he's going with this. He's on
5 cross-examination. It may be but maybe not.

6 THE WITNESS: Could you ask again?

7 THE COURT: Start again, please.

8 Q Yes. Some of the changes in RSS to develop RQC,
9 some of the differences, were related to features that
10 have been identified as the shopping cart and the
11 manner in which a requisition on any requisition was
12 created; is that right?

13 MS. ALBERT: Renew my earlier objection and
14 also object based on lack of relevance.

15 THE COURT: I thought you made a point in
16 your opening statement that none of these were at
17 issue.

18 MR. THOMASCH: They are not, Your Honor.

19 THE COURT: Why are we asking about it then,
20 I guess?

21 MR. THOMASCH: Because we have document after
22 document that talk about RSS or RQC without any
23 relationship or identification of Punchout
24 functionality.

25 If the only change in RSS to RQC related to

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1 the Punchout functionality, it would be a fair
2 inference that such documents were pertinent to this
3 examination.

4 If that is a small change in the overall
5 context of other changes and there is no specification
6 of which change is at issue, I would like this
7 witness --

8 THE COURT: Hand him the documents.

9 MR. THOMASCH: If the documents doesn't --

10 THE COURT: The purpose of asking it is to
11 help interpret the real meaning of a document.

12 MR. THOMASCH: Yes.

13 THE COURT: Because it could refer to more
14 than one thing?

15 MR. THOMASCH: It could refer to something
16 entirely different.

17 THE COURT: I see. Objection overruled.

18 BY MR. THOMASCH:

19 Q Your expert report contains both of them, multiple
20 sections, including a section that relates to changes
21 apart from Punchout functionality, correct?

22 A Yes.

23 Q And those other changes were in the RSS to RQC
24 module, correct?

25 A You're talking about the three major changes?

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1 Q Yes. That were the subject matter of both of your
2 reports, 130-some odd pages total?

3 A Yes.

4 Q And one of those three changes that you wrote
5 about relates to the functionality of Punchout about
6 which you've been testifying, correct?

7 A Correct.

8 Q Two were different, correct?

9 A Yes, they were.

10 Q But all three relate to RQC, correct?

11 A Yes.

12 Q In your analysis of the colorability of the other
13 changes you looked at whether or not they were
14 designed to minimize any impact on customers, didn't
15 you?

16 A No.

17 Q You didn't consider that?

18 A I don't think so.

19 Q You did consider other changes to RQC and you
20 cited to documents that just referenced RQC, correct?

21 A Yes.

22 Q So when a document indicates RQC, do you
23 automatically assume by definition that it also was
24 intended by the author of that document to encompass
25 Punchout, Punchout functionality?

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1 A No.

2 Q Is it your statement that what has been done to
3 mitigate this issue, and I'm taking you now back to
4 page 661, asking about what have we done to mitigate
5 this issue. Is there anything on page 661 that you
6 believe, you interpret, as being directly related to
7 Punchout functionality?

8 A In the third bullet that you're discussing
9 designed to minimize impact on our customers, that's
10 talking about RQC.

11 Q All talking about RQC, isn't it?

12 A Yes, it is.

13 Q Is it all talking about Punchout functionality as
14 directed by RQC?

15 A Probably not. Limited to Punchout.

16 Q Is there anything in here that you find is
17 specific to Punchout?

18 A Not labeled as --

19 THE COURT: You mean on page 661?

20 MR. THOMASCH: On 661.

21 A No, not on page 661, that's right.

22 Q Can we look at page 665, please? And I want to
23 take your attention to the second bullet point. You
24 were asked about this under the heading "Designed with
25 three principles in mind." You'll see, "100 percent

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1 functionality you require must be included." That was
2 the first one, right?

3 A That's right.

4 Q The second one was add additional new functions;
5 is that correct?

6 A Correct.

7 Q The third one was opened up for future mobile
8 requisitioning capabilities; do you see that?

9 A Yes.

10 Q Opened up for future mobile requisitioning
11 capabilities was not in any way specific to Punchout,
12 was it, sir?

13 A It is not.

14 Q Additional new functions, were there any
15 additional new functions to Punchout functionality
16 that were added at the time that the limitations were
17 put in place?

18 A No.

19 Q No corresponding trade off. We stopped you from
20 doing this, but we gave you something new and
21 different that you can do?

22 A I don't understand your question, sir.

23 Q Well, there were limitations on things you used to
24 be able to do that you now can't. At the time those
25 changes were made, was Lawson able to figure out some

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1 new benefit that you can get a better Punchout
2 experience with RQC?

3 A I don't know.

4 Q You're not aware of anything, are you?

5 A No.

6 Q The changes that you're aware of only go in one
7 direction, they only diminish functionality that was
8 previously available but is no longer available,
9 correct?

10 A Correct.

11 Q Now, the 100 percent functionality you require, do
12 you read that to mean 100 percent of the functionality
13 that you previously had?

14 A Yes.

15 Q You don't recognize a difference between those two
16 terms?

17 A Which two terms?

18 Q That you require and that you previously had.

19 A You asked me how I interpreted this statement.
20 Yes, those are two different statements.

21 Q Do you interpret those as the same?

22 A I interpret 100 percent functionality you require
23 to reference the functionality that had previously
24 been provided in RSS, and that is the basis of the
25 requirement. It's required in RQC because you had it

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1 in RSS.

2 Q Did you see any deposition testimony from Lawson
3 employees about what that phraseology meant?

4 A No.

5 Q I would ask you, sir, to look at Exhibit No. 1026.
6 Do you have that document in front of you?

7 A I do, sir.

8 Q It's a one-page email with three separate email
9 messages. Do you see that?

10 A I do.

11 Q Is any part of this in your opinion specific to
12 Punchout functionality?

13 A Punchout is not specifically named.

14 Q Now, you made reference to the first message which
15 I believe is from Mr. Christopherson to Mr. Lohkamp,
16 and it says, "Key is that RQC is built on RSS. So
17 it's not a 100 percent new product." Do you see that?

18 A I do.

19 Q You're not aware of any allegation in this case
20 that RQC was a 100 percent new product, are you?

21 A No.

22 Q You, however, testified that that influenced your
23 opinion that it was not more than colorably different,
24 correct?

25 A Correct.

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1 Q Does it have to be 100 percent new in order to be
2 more than colorably different in your opinion?

3 A No.

4 Q Does it have to be 90 percent new in your opinion?

5 A That's a value judgment.

6 Q Well, I know. I'm looking for your values here.

7 I'm trying to figure out when you made a decision,

8 you've said it doesn't have to be 100. Is there some

9 baseline minimum, it needs to be above that or it

10 can't be more than colorably different?

11 A I think it would have to be 50 percent new.

12 Q So more than 50 percent new to be more than

13 colorably different; is that your --

14 A Yes.

15 Q When you're deciding which percentage of a product

16 that is not 100 percent new is new, how do you

17 actually do that?

18 A I would look at the way it operates.

19 Q Would you look at the lines of code or would you

20 look at the -- would you look qualitatively at what it

21 does?

22 A Certainly that would be one way, looking at the

23 code, but I looked at the way it operates.

24 Q And it needs to be more than 50 percent new in its

25 operation?

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1 A That's my opinion.

2 Q Okay. And just to clarify terminology, if there's
3 a loss of functionality, is that a new -- is that new
4 for your purposes because it's different?

5 A No.

6 Q So is there any amount of lost functionality that
7 would be sufficient to make something more than
8 colorably different?

9 A No.

10 Q No matter how much functionality it lost, if it's
11 still there it's not more than colorably different?

12 A Correct.

13 Q If you could look at Exhibit 1124. I want to ask
14 you about the Mindy Klebe to Mary Finkler document
15 that you incorporated into your analysis of your
16 expert opinion. Okay?

17 A Okay.

18 Q Before you were questioned here today, did you
19 know who Mary Finkler is?

20 A I was not asked that question.

21 Q I know.

22 A No, I don't.

23 Q Did you know who Mindy Klebe was?

24 A Yes.

25 Q What did you understand about Mindy Klebe?

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1 A She was an employee of Lawson.

2 Q And you saw that she indicates that she tested
3 requisition center, correct?

4 A Yes.

5 Q Are you aware that you can test -- withdrawn.
6 There's requisition center in Configuration 2,
7 correct?

8 A Yes.

9 Q And there's requisition center in Configuration 3,
10 correct?

11 A Yes.

12 Q Can you test requisition center without testing
13 the functionality of Punchout?

14 A Yes.

15 Q Do you have any idea whether what Mindy Klebe
16 tested included Punchout?

17 A This does not say.

18 Q So you do not know; is that right?

19 A I do not know.

20 Q So it's possible that this entire document relates
21 to testing of a configuration that didn't include
22 Punchout?

23 A I don't know.

24 Q If I could ask you to look at Exhibit 1100. Do
25 you see it, sir?

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1 A Yes, I do.

2 Q And your attention was drawn to, among other
3 things, the top two emails on the first page of
4 Exhibit 1100 including the statement from Dean Hager.
5 Do you see that?

6 A Yes, I do.

7 Q Is there anything in Mr. Hager's statement, the
8 body of the statement as opposed to the subject line,
9 is there anything in Mr. Hager's statement that
10 relates specifically to Punchout?

11 A Punchout is not specifically named.

12 Q It is noted, however, as counsel directed your
13 attention to, in the subject, is that right?

14 A Yes, it is.

15 Q Now, am I correct that update on requisition
16 center and Punchout is the original subject matter of
17 the first email that appears on page ending Bates
18 No. 778? Do you see the 4:01 PM email from Michael
19 Poling?

20 A Yes, I do.

21 Q And that relates to requisition center and
22 Punchout, correct?

23 A Yes, it does.

24 Q It deals specifically with customers who have RSS
25 and Punchout deals, correct?

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1 A Correct.

2 Q And further down there's a section called
3 "Services, customers who already own RSS buying
4 Punchout." Do you see that?

5 A Yes.

6 Q Underneath it it says, "You're selling Punchout
7 for use with RQC. We will not implement it with RSS."
8 Do you see that?

9 A I do.

10 Q Do you know whether anything in this document
11 relates to a description of the functionality of
12 Punchout in RQC or how that functionality compares to
13 the functionality of Punchout with RSS?

14 A In this document?

15 Q In this document.

16 THE COURT: The whole document?

17 MR. THOMASCH: Yes.

18 THE COURT: I don't know if he's read that.

19 MR. THOMASCH: I will withdraw that.

20 THE COURT: If you're asking him to do that,
21 we're going to take a recess.

22 MR. THOMASCH: I will withdraw it and just go
23 to the two emails that he read on direct examination.

24 Q So if we look at the Dean Hager May 26, 8:02 AM
25 email, is there anything in there that you interpret

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1 that relates to a comment on the functionality of
2 Punchout in the modified product or a comparison of
3 that functionality to the functionality that existed
4 with RSS?

5 A Punchout is not specifically named in these
6 points.

7 Q If we go up to the top email, again, is Punchout
8 functionality drawn out by the author of the top
9 email?

10 A Not by name.

11 Q Do you have Plaintiff's Exhibit 1072, sir?

12 A Yes.

13 Q Do you know who Mr. Charlie Walters is?

14 A He's an employee of Lawson.

15 Q Do you know who Mr. Scott Hanson is?

16 A An employee of Lawson.

17 Q What are Mr. Hanson's duties?

18 A Well, I don't know specifically. I don't know
19 specifically.

20 Q Do his duties matter to you at all in trying to
21 interpret as an expert witness the significance of his
22 statements regarding RQC or RSS? Does it matter what
23 his job is to you?

24 A Yes.

25 Q But you don't know his job?

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1 A Well, I did, but I've forgotten.

2 Q Do you know whether Mr. Hanson, who will be a
3 witness at this case, or at least is on plaintiff's
4 witness list and is here to testify here in Richmond,
5 do you know if he knows anything about the differences
6 between the functionality of Punchout with RSS and
7 with RQC?

8 A I believe he does.

9 Q On the basis of that belief that he's
10 knowledgeable on that subject matter, you gave weight
11 to Exhibit 1072; is that correct?

12 A Correct.

13 Q If we look at 1027 quickly. Have you read this
14 document?

15 A Yes.

16 Q You might recall that it covers a host of topics
17 including empty nest syndrome, puppies, Facebook
18 friending and the like, correct?

19 A Correct.

20 Q And at the very top there's a statement about RQC
21 and did you understand that Aaron Drury was a
22 customer?

23 A Yes.

24 Q Who is he a customer -- what customer is it?

25 A Providence Health.

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1 Q Does Providence Health have Punchout?

2 A I don't know.

3 Q Is this document -- did you interpret this
4 document to be an analysis or communication by Mindy
5 Klebe about the functionality of Punchout in RQC?

6 A It clearly says it's about RQC.

7 Q Right. And what I want to know is we've agreed,
8 have we not, that there are other aspects of RQC that
9 exist utterly independent of Punchout, right?

10 A Correct.

11 Q Can you tell when you read this document whether
12 what she's talking about relates to the other aspects
13 or relates to the Punchout aspects? Can you divine
14 that?

15 A No.

16 Q I'd ask you to look at Exhibit 1066, please.
17 Specifically, your attention on direct examination was
18 to the email from Scott Hanson to James Healey, the
19 second email, June 30, 2011, 10:48 AM. Do you see
20 that?

21 A Yes, I do.

22 Q Do you recall testifying about that?

23 A I do.

24 Q Am I right that, again, your belief that the
25 documents with Scott Hanson's name on it are relevant

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1 to this proceeding is in part based on your belief
2 that Scott Hanson is knowledgeable about the
3 differences between the functionality of Punchout with
4 RSS and with RQC, correct?

5 A Yes.

6 Q When he said RSS and RQC are just two user
7 interfaces, did you interpret that to relate to the
8 functionality of trying to go from a search in one
9 Punchout vendor's website to a search in another
10 Punchout vendor's website? Is that what that was
11 about?

12 A It doesn't say that.

13 Q Do you think it was about the functionality of
14 going from a search in item master and a selection of
15 a good in item master and then an attempt to try to go
16 to Punchout? Do you think it had anything to do with
17 that?

18 A No, it's about data migration.

19 Q Lastly, if you would look at one more Scott Hanson
20 document, which is Plaintiff's Exhibit 1065. This is
21 about installations for no charge in the email from on
22 Thursday, September 1, at 11:30, 6 AM in the middle of
23 the page .do you see that?

24 A I do. By the way, to answer a previous question
25 you asked of who is Scott Hanson, so now that I've

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1 seen the email, I remember. RQC's SWAT team manager.

2 Q That was a special position he was put in after
3 the conversion from RSS to RQC, correct?

4 A I guess.

5 Q What was his job at that time? His real job?

6 THE COURT: At the time he was a SWAT team
7 manager?

8 MR. THOMASCH: The SWAT team manager was a
9 function that he assumed. He had a position.

10 THE COURT: What was his other job?

11 BY MR. THOMASCH:

12 Q What was his job at Lawson when they asked him to
13 serve in the role as SWAT team manager.

14 A I've forgotten.

15 THE COURT: Well, there are all kinds of
16 documents in here that say he's a technical manager.
17 Does that help me out at all?

18 MR. THOMASCH: I think you'll hear testimony
19 that he oversees the individuals who do the
20 installations.

21 THE COURT: So that's what a technical
22 manager is?

23 MR. THOMASCH: Yes.

24 THE COURT: Okay.

25 MR. THOMASCH: He'll be here and can testify.

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1 THE COURT: Okay. That's fine. We spent a
2 lot of time on his job. If he's going to be here, we
3 can ask him.

4 Q But you in forming your opinions that are now on
5 the record considered his knowledge to be a basis for
6 crediting statements and interpreting statements, none
7 of which related to or specifically identified
8 Punchout; is that right?

9 A Only in the -- in the emails that we looked at
10 today, that's true.

11 MR. THOMASCH: Your Honor, I'm going to move
12 to a new area having finished the documents that I was
13 going to talk about.

14 THE COURT: I was so hopeful that you were
15 through. How much longer do you have?

16 MR. THOMASCH: I have a ways to go, Your
17 Honor.

18 THE COURT: Well, you have now marked
19 yourself as some kind of Southerner because you can't
20 talk in terms of time and terms of specified numbers
21 of units that are recognizable. That comes from my
22 wife. I've got some time. Do you have any idea how
23 much time?

24 MR. THOMASCH: I would probably estimate that
25 it would be between 30 and 60 minutes.

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1 THE COURT: All right. We'll take a
2 20-minute recess to change reporters.

3 (Recess at 3:55 PM.)
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1 THE COURT: All right, Mr. Thomasch. Continue.

2 MR. THOMASCH: Thank you, Your Honor.

3 Q Dr. Weaver, I want to ask you some questions about
4 your views or opinions as to how the functionality of the
5 product would be perceived by users of the product; all
6 right?

7 A Okay.

8 Q You've used --

9 THE COURT: Excuse me just a minute, Mr.
10 Thomasch.

11 MS. ALBERT: Object; beyond the scope and beyond
12 the scope of the opinions rendered in his report.

13 THE COURT: You say he didn't issue any opinions
14 on that? Is that what you said?

15 MS. ALBERT: Correct.

16 THE COURT: Why are you getting into that? She
17 didn't ask about it, did she?

18 MR. THOMASCH: She showed customer inquiries in
19 the course of her examination. She clearly has gone into
20 the perceptions of customers and what was being told to
21 customers and what customers were saying to Lawson.

22 MS. ALBERT: He didn't rendered any opinions
23 about customer perceptions about the product.

24 MR. THOMASCH: Let me rephrase the question.

25 THE COURT: I understand what she did, but I

1 don't think she did what you -- what I understand you were
2 talking about doing, but maybe you can straighten it out.

3 MR. THOMASCH: Sure.

4 Q Dr. Weaver, you, yourself, have used electronic
5 purchasing requisition software; correct?

6 A Yes.

7 Q And you would agree with me, would you not, that you
8 consider it to be beneficial to be able to combine on a
9 single requisition search items from multiple Punchout
10 vendor sites?

11 A Yes.

12 Q You would agree with me that being able to do so is a
13 convenience compared to having to do multiple requisitions
14 on -- multiple purchases on multiple requisitions; is that
15 correct?

16 MS. ALBERT: Objection; relevance.

17 THE COURT: Overruled.

18 A Yes.

19 Q You would agree with me that the process of being able
20 to combine items from different Punchout vendor websites
21 onto a single requisition is, indeed, a cost-saver?

22 MS. ALBERT: Objection; relevance.

23 THE COURT: Where are you going with this?

24 MR. THOMASCH: Your Honor, we're talking about
25 the functionality that has been changed in the product,

1 and I'm trying to say that the functionality is not a
2 matter of no consequence.

3 MS. ALBERT: There's no contention that Lawson's
4 made here that there is any cost differentiation between
5 the systems. That's never been contended to be one of the
6 differences between the RQC configurations and the RSS
7 configurations.

8 MR. THOMASCH: I'm simply asking him whether or
9 not it is a cost savings to be able do that, and I base
10 that, Your Honor -- I have a good-faith basis for asking
11 the question. I base it on prior statements made by the
12 witness himself, and I believe we're entitled to bring out
13 attributes of the product qualitatively, attributes of the
14 product that have been changed.

15 MS. ALBERT: We're not -- now we are getting into
16 his prior trial testimony, and I thought that wasn't a
17 ground we were supposed to retread.

18 MR. THOMASCH: I did not ask about his prior
19 testimony. I asked as he sits here today. If it turns
20 out that he was to deny something that he swore to before
21 Your Honor before, I might impeach him, but I'm not asking
22 about his prior testimony. I'm asking about his opinions.

23 THE COURT: I understand that. I guess my
24 question is, what's the opinion got to do with anything we
25 have to decide here?

1 MS. ALBERT: He hasn't rendered any opinions
2 about cost savings.

3 MR. THOMASCH: Your Honor, he has a view as to
4 the benefits that existed in the system that was the
5 infringing system. He has stated clearly and repeatedly
6 certain benefits that go with that.

7 THE COURT: He didn't state it here.

8 MR. THOMASCH: Well, he just said it was
9 beneficial --

10 THE COURT: He didn't state it on direct
11 examination.

12 MR. THOMASCH: And he has more that I believe he
13 agrees with based on his prior testimony, and I just want
14 to draw out, Your Honor, that which he says -- he has said
15 the prior system provided certain benefits. It is those
16 benefits that have been sacrificed in the functionality
17 loss.

18 MS. ALBERT: It's beyond the scope of my direct.
19 I didn't ask him about his prior trial testimony.

20 THE COURT: I don't think he's really saying
21 that, but, one, he didn't testify on that topic in direct
22 examination. Two, it sounds like you want to use him as
23 your witness to prove one of your points. It's also
24 appropriate to ask him questions of this sort if it
25 impeaches him. I don't think it does that. It's also --

1 at least you haven't said that's what the purpose of it
2 is, and it's also permissible to ask him questions like
3 that to set some kind of context for something he did say,
4 but I haven't heard that either.

5 It sounds to me like what you are doing is you
6 want him to testify to things that basically are helpful
7 to -- as a part of your case in other words, and if you
8 want to do that, you have to call him back in your case
9 and -- and you have to pay him because he is an expert.
10 He has to have issued an opinion on the topic, and she
11 said he didn't issue an opinion on the topic as part of
12 his report, so I don't see how he can testify with
13 specific to any of it. So help me out here.

14 MR. THOMASCH: Sure. It's cross-examination.

15 THE COURT: I know, but that doesn't open up --

16 MR. THOMASCH: I have half a dozen questions
17 about the qualitative benefit to the prior system that has
18 been lost as a result of the change, and the Federal
19 Circuit has told us to compare the old and the new, and
20 that comparison -- there's a specific delta. There's
21 something that existed and has been lost.

22 If the what was changed was of no consequence to
23 anyone, I guarantee you they would have brought it out on
24 direct. What they brought out on direct was that he
25 doesn't think it's any big deal, but he doesn't

1 acknowledge, he has not yet acknowledged that what was
2 lost is a matter of significance, and I do have a right to
3 establish that or I'm not able to put in context his
4 opinion that it's not more than colorably different.

5 THE COURT: Ms. --

6 MR. THOMASCH: Your Honor, he specifically said
7 it was cosmetic, and if it's cosmetic, it suggests to me,
8 as I hear that word and as I think Your Honor might hear
9 that word, that a cosmetic change, the loss of a cosmetic
10 change would not matter.

11 THE COURT: You are getting a lot of coaching
12 here, aren't you?

13 MR. THOMASCH: I am, and there is because I
14 should have but didn't memorize the report. In paragraph
15 47 of his report on page 21, he does say that the changes
16 made to RSS were minimal and would not degrade system
17 functionality.

18 That's his point, is you are not losing something
19 that's important. I can certainly establish that what's
20 being lost here is beneficial.

21 THE COURT: All right. Anything else, Ms.
22 Albert?

23 MS. ALBERT: No, nothing else.

24 THE COURT: I believe you can if you confine it.
25 Let me say that I'm aware that there are places in the

1 world where cross-examination is viewed as the right to be
2 here for weeks. There's a case going on now where
3 cross-examination has lasted 15 days or something like
4 that. This isn't one of those places, so I'm going to
5 expect you to tailor your questions, get in and get out
6 with the important points.

7 MR. THOMASCH: I will do so, Your Honor.

8 THE COURT: All right, objection overruled.

9 Q Dr. Weaver, this quality of being able to bring
10 together items from multiple Punchout vendors' websites
11 that was present with RSS and is not present with RQC,
12 would you agree with me that that is a cost-saver in the
13 requisitioning process for the user?

14 A Probably so, but it's not part of the claim.

15 Q And I'll stipulate if it will help that I'm not asking
16 you about whether it's part of the claim in any of the
17 next series of questions. I'm simply asking about the
18 experience in using it.

19 A Understood.

20 Q And having the ability to combine items from multiple
21 Punchout vendor websites on a single requisition is a
22 time-saver; is it not?

23 A Yes.

24 Q It is a cost-saver?

25 A Probably.

1 Q It is one of the novelties of the patent?

2 MS. ALBERT: Object. The novelties of the patent
3 are stated in the claims, and that is not a claim element.

4 THE COURT: Sustained.

5 Q You would agree with me, would you not, that being
6 able to pull those multiple sources from multiple Punchout
7 vendor websites down into one requisition is a, quote,
8 real benefit, end quote, would you not?

9 A Yes.

10 Q Indeed, it is a big deal.

11 A It was a big deal in the context of the patent.

12 Q Now, despite the fact that you would acknowledge that
13 that attribute which has been lost was beneficial, a
14 convenience, a time-saver, a benefit, and a big deal, I'm
15 right that you still don't think that it's more than
16 colorably different to have lost that attribute; is that
17 correct?

18 A That's correct.

19 Q Am I right that's because at the end of the day, what
20 was lost doesn't stop the product from infringing, in your
21 opinion?

22 A No, that's not correct. It's because those elements
23 that you discussed -- they are not elements. Those
24 attributes that you discussed are not related to claim 26.
25 That's why they are not colorably different.

1 Q Not related to claim 26. To be related to claim 26,
2 it would relate to the functionality of the claims;
3 correct?

4 A Absolutely.

5 Q All right. And saying that you have -- you have the
6 functionality of the '683 claims in the new product;
7 correct?

8 A Yes.

9 Q In your opinion?

10 A In my opinion.

11 Q And in saying that you have the functionality of the
12 '683 claims in the new product, you are saying that you
13 infringe the '683 claims, aren't you?

14 A I'm not saying that today. We're talking about
15 colorability.

16 Q I'm asking you whether or not the capacity to
17 infringe -- withdrawn. Let me ask you if you recall being
18 asked that question at your deposition. If I can show you
19 your transcript.

20 MS. ALBERT: This is improper to show him his
21 transcript without setting it up.

22 MR. THOMASCH: Happy to not show him his
23 transcript. I thought it was...

24 THE COURT: Well, the proper procedure is to ask
25 the question without reference to the transcript, and if

1 he gives a different answer, then you give him an
2 opportunity to look at his testimony and find out, and
3 then -- and the testimony that was there given at the
4 deposition has to match exactly what it was that he's
5 asked here or it's not impeaching. All right, so -- and
6 it also, of course, has to be relevant. I don't want to
7 get into -- we're not into testimony about impeachment
8 yet -- I mean infringement yet.

9 MR. THOMASCH: No, Your Honor, we're in testimony
10 about functionality, and I just want to understand his
11 understanding and his -- the way he is evaluating
12 functionality.

13 THE COURT: I'll just take a question at a time.
14 I'm not going to rule on them in advance. She can object
15 if she wants to object. If she doesn't, I don't have to
16 rule.

17 Q In the way you are using functionality, Dr. Weaver, as
18 you sit here and as you've given your testimony, I want to
19 understand that term. Can you have the functionality of
20 the '683 claims without infringing the '683 claims?

21 A No.

22 Q So by saying you have the functionality of the '683
23 claims, you are saying that you do infringe the '683
24 claims, or Lawson does; correct?

25 A Yes.

1 THE COURT: I just told you I thought we weren't
2 going to get into the question of infringement, and you
3 just asked about it.

4 MR. THOMASCH: Your Honor, I asked him to
5 understand that that is how he defines functionality in
6 this case.

7 THE COURT: That isn't exactly what he said,
8 either.

9 MR. THOMASCH: Your Honor, I'll live with the
10 record as it is.

11 Q I have a binder for you. Dr. Weaver, could I ask you
12 to turn to a document premarked as Plaintiff's
13 Exhibit 1019. Do you recognize this document?

14 A No.

15 Q Do you have your expert witness report there, sir?

16 A I do.

17 Q Could you turn to your expert witness report, the
18 initial one, and turn to paragraph seven where you set
19 forth the documents that you reviewed in connection with
20 this case.

21 A Yes.

22 Q Do you see a list of documents on paragraph -- I'm
23 sorry, on page four?

24 A I do.

25 Q And looking for RQC 2291408. Sorry, Your Honor.

1 A No, I don't see that.

2 THE COURT: I don't see it on this list. Help us
3 with where it is.

4 MR. THOMASCH: Your Honor, I'm sorry. It was a
5 deposition exhibit, Christopherson 27.

6 THE COURT: Excuse me. It's not in his -- on
7 that list; is that what you are saying?

8 MR. THOMASCH: What it is, Your Honor -- I'm
9 sorry, this is my fault.

10 Q Dr. Weaver, page two says, materials reviewed and
11 relied on; do you see that?

12 A Yes.

13 Q And then if you turn over to page three, you see
14 subsection S?

15 A Yes.

16 Q Transcript of deposition of defendant's 30(b)(6)
17 witness, Dale Christopherson taken on December 19 to 20,
18 2011, and all exhibits thereto?

19 A Yes.

20 Q And do you see on this document, I'll represent to you
21 that exhibit sticker on the bottom indicates that this
22 document was from the second day of the Christopherson
23 deposition on 12/20/2011, was marked as Exhibit 27, and
24 this was one of the items subsumed within paragraph S on
25 page three of your report; is that correct?

1 A That's apparently correct.

2 Q So what I want to do is ask you to look through the
3 top of the document that indicates that it's from Keith
4 Lohkamp to three individuals including Jennifer Langer,
5 Darci Snyder, Dave Kempker; do you see that?

6 A Yes.

7 Q And in the first paragraph, Mr. Lohkamp -- withdrawn.
8 Do you know who Mr. Lohkamp is?

9 A Yeah, Lawson employee.

10 Q And you relied on certain documents that he was an
11 author or recipient of in forming your opinion?

12 A I did.

13 Q And in the beginning of this document, he says, late
14 last week, Dale and I were asked; do you see that?

15 A Yes.

16 Q The reference to Dale, would you --

17 A Mr. Christopherson.

18 Q -- expect that to be Mr. Christopherson? Back to
19 quoting the document again, late last week, Dale and I
20 were asked to make additional changes related to
21 functionality in Requisition Center. I would prefer not
22 to do this, but our advice is that we need to do something
23 like this. Do you see that?

24 A I do.

25 Q All right. And do you see that the summary of that

1 additional change related to functionality and Requisition
2 Center as set forth below?

3 A Yes.

4 Q That includes the business rule under -- where it
5 says, thanks, Keith. Do you see where it says business
6 rule?

7 A Yes.

8 Q Items from Punchout will be on a separate requisition
9 from items added through find/shop, express categories, or
10 service/special?

11 A Yes.

12 Q Those functional changes were made and do exist in RQC
13 now; correct?

14 A They were.

15 Q And did you give any significance to Mr. Lohkamp's
16 statement that I would prefer not to do this as far as
17 whether the action being taken was a diminishing of the
18 functionality of the product?

19 A I don't know what he was thinking.

20 Q But you didn't make any -- you didn't read anything in
21 or have any takeaway message from this one?

22 A No.

23 Q If you would look at Plaintiff's Exhibit 1096, please.
24 This is a long series of emails that begins with an email
25 from Keith Lohkamp on Friday June 3rd, 2011, at 12:47 p.m.

1 which appears on the last page of the document; do you see
2 that?

3 A I do.

4 Q And this was part of the exhibits to the deposition of
5 Dean Hager which you also reviewed; correct?

6 A That's right.

7 Q Now, in that initial email, Keith Lohkamp to Dean
8 Hager and Jennifer Langer, and it begins with, Hi Dean,
9 our legal counsel recommended that we make one additional
10 change to Requisition Center that impacts Procurement
11 Punchout to help address concerns about being able to add
12 items from two vendor catalogs. We wanted to escalate to
13 you, provide input and help the decision to make this
14 change. Legal is requesting this decision today if
15 possible so development can begin. Do you see that?

16 A I do.

17 Q And then the next paragraph has a requested change, a
18 development impact, and an impact; do you see that?

19 A Yes.

20 Q So the requested change itself is requiring one
21 requisition per Punchout vendor; in other words, you could
22 not put items from two Punchout vendor sites on a single
23 requisition; do you see that?

24 A I do.

25 Q And do you understand that to be the second of the

1 two-part change that we talked about at the very beginning
2 of your deposition when I had the description of the
3 changes on the board, on the TV monitor?

4 A It wasn't my deposition.

5 Q I'm sorry, in our questioning here today on
6 cross-examination at the beginning to clarify what changes
7 we were talking about, there were two slides shown to you
8 that you agreed were factually accurate. The second one,
9 this change -- is describing this change; is that right?

10 A That's right.

11 Q The development impact says, Dale estimates two to
12 three days of development, and his team is ready to go
13 immediately if we give the go-ahead; do you see that?

14 A I do.

15 Q The next one says, impact, this will have a negative
16 impact on our customers who use Punchout, and this is on
17 top of the change we made to require different
18 requisitions for Punchout versus non-Punchout items; do
19 you see that?

20 A I do.

21 Q Did you consider and give any weight to that view
22 expressed in a Lawson internal document when you formed
23 your opinion?

24 A No. It's not relevant.

25 Q The next word is concerns, and after concerns the

1 first concern is, this will be a step backwards for
2 customers, and we've been talking about RQC as a superior
3 product. Cleveland Clinic, for example, specifically
4 asked during the webinar Q&A about whether they could put
5 two Punchout vendors on a single requisition; do you see
6 that?

7 A I do.

8 Q Do you agree with the statement that this will be a
9 step backwards for customers?

10 A It's a difference. It's not relevant.

11 Q It's not relevant because in your mind it doesn't
12 relate to the patent claims in a way that you think it
13 needs to in order to be relevant?

14 A That's right.

15 Q But for the person who doesn't know about the patent
16 and is simply using the product, for that person, the
17 functionality change was a decrease in functionality;
18 correct?

19 A Correct.

20 Q And that's a step backwards; right?

21 A Probably.

22 Q The ability to combine items from multiple Punchout
23 vendor websites is one that's been around for at least a
24 decade; correct?

25 A Correct.

1 MS. ALBERT: Objection; lacks foundation.

2 MR. THOMASCH: I have an expert on the stand,
3 Your Honor. He knew the answer.

4 THE COURT: He gave it. Overruled.

5 Q And, in effect, from a technology vantage point, this
6 is a step back by more than a decade; correct?

7 A I guess you could consider it that way.

8 Q May I ask you to look at Exhibit 1057. Do you see
9 that this is a deposition exhibit of Scott Hanson? Do you
10 recognize this as one of the Q&A documents you reviewed?

11 A I do, yes.

12 Q From the webinar?

13 A Yes.

14 Q So I would ask you, do you see in the left-hand column
15 there are numbered questions.

16 A I do.

17 Q If you would go to question 64, from Don Grochocinski.
18 I'll spell that for the reporter. It's
19 G-r-o-c-h-o-c-i-n-s-k-i. Do you see that gentleman's
20 question?

21 A Yes, I do.

22 Q And it says, with RSS, we were able to mix Punchout
23 items with stock items on a requisition; do you see that?

24 A I do.

25 Q Are stock items -- does that -- do you understand that

1 to mean an item that you would get from item master?

2 A Yes.

3 Q So the gentleman says, with RSS, we were able to mix
4 Punchout items with stock items on a requisition. I've
5 seen info that suggests that is not possible with RQC. Is
6 this previous functionality of RSS likely to be restored
7 to RQC; did you see that?

8 A I do.

9 Q Did you give that comment any consideration in the
10 formulation of your opinion?

11 A No.

12 MR. THOMASCH: Your Honor, if I might have just a
13 moment.

14 Q Did you review any documents from any health-care
15 provider indicating that by losing the functionality that
16 was lost in the move from RSS to RQC there would be
17 inefficiency from the need to create multiple
18 requisitions, multiple purchase orders, and multiple
19 invoices?

20 A I don't remember.

21 Q If you had seen evidence that indicated a health care
22 customer's concerns that the change in functionality would
23 create multiple requisitions, multiple purchase orders,
24 multiple invoices, and would be very inefficient, is that
25 something that would influence your opinion on

1 colorability, sir?

2 MS. ALBERT: Objection; relevance and compound.
3 First of all, invoices have no relevance to this
4 proceeding. Secondly, multiple requisitions aren't
5 relevant to the claim.

6 MR. THOMASCH: This is exactly within the
7 epicenter of the lost functionality. The witness has
8 testified all sorts of things that influence his
9 testimony. I'd like to find out whether that set of facts
10 would matter to him.

11 MS. ALBERT: Invoices have no relevance.

12 THE COURT: I think you've gotten tied up in how
13 you presented it. I assume you're going to offer proof
14 that somebody said that.

15 MR. THOMASCH: Before the case is over, yes.

16 THE COURT: All you need to ask him, would it
17 make a difference to your opinion if someone had expressed
18 that view and leave the invoice and all the other
19 information out of it, if a customer had expressed that
20 view, which is fairly close to what you did, but the way
21 you asked it elicited an objection.

22 Q If a customer voiced those words and those thoughts,
23 would that matter to you in the formulation of your
24 opinion?

25 A No.

1 Q And is that because such complaints, such concerns
2 about inefficiency are not an element of claim 26?

3 A They're not related to claim 26.

4 Q But they relate to a difference in the real world as
5 to how the old system and the modified system actually
6 operate; correct?

7 A They are different, a little bit different.

8 Q If there was no prohibition, no injunction in place,
9 can you think of any business or technological reason why
10 Lawson would not restore that functionality to the
11 product?

12 MS. ALBERT: Objection; vague. What
13 functionality? And relevance.

14 Q Dr. Weaver, the functionality that I'm talking
15 about --

16 THE COURT: What about the relevance? I don't
17 understand. There's a real reason to also. You know what
18 the real reason is?

19 MR. THOMASCH: I understand the legal
20 constraints. I asked him --

21 THE COURT: I know, but there's more than an
22 injunction. There's the law of patent and there's the
23 extant patent.

24 MR. THOMASCH: I understand that completely.

25 THE COURT: You didn't put that in your question.

1 MR. THOMASCH: Then I will ask Your Honor if I
2 can rephrase my question.

3 THE COURT: Try that.

4 Q If Lawson had a license from ePlus to practice under
5 any and all of its patents, would there be any reason,
6 from a technological standpoint or a business standpoint,
7 why it would not want to reinstate that lost
8 functionality?

9 A Probably not.

10 MR. THOMASCH: Nothing further, Your Honor.

11 THE COURT: Redirect?

12 MS. ALBERT: I have just a few.

13

14 REDIRECT EXAMINATION

15 BY MS. ALBERT:

16 Q Do we have the configuration demonstrative again with
17 three and five side by side?

18 Dr. Weaver, were any changes made to the Punchout
19 application?

20 A Nothing. Absolutely nothing.

21 Q Now, were you aware of the relevant changes with
22 respect to requisitioning Punchout items and when they
23 were made at the time you rendered your opinions?

24 A Absolutely.

25 Q When you saw documents describing the system as a

1 whole during the relevant time frames, did you have any
2 reason to believe that this Punchout requisitioning
3 functionality was specifically excluded from the
4 descriptions of RQC and those documents?

5 A No.

6 Q Did it seem probable to assume a reference to the
7 entire configuration included reference to all of the
8 changes that were brought with RQC?

9 A Yes, indeed.

10 Q Now, did you render any opinions relating to lack of
11 colorable difference based on a percentage of code change?

12 A No.

13 Q Now, Mr. Thomasch asked you about a hypothetical
14 example of going to 100 Punchout sites and shopping on
15 those sites and bringing items back to requisition and
16 generating purchase orders.

17 How would you go -- how would you shop at 100 Punchout
18 sites and select items and requisition and order items
19 using the infringing configurations? Can you describe
20 that process?

21 A Using RSS you are asking?

22 THE COURT: Wait a minute. You are talking about
23 using RSS or RQC?

24 MS. ALBERT: I want to compare and contrast the
25 process.

1 THE COURT: I understand, but your first question
2 is RSS.

3 MS. ALBERT: Using the infringing configurations
4 having requisition self service.

5 A You could go to any number of -- this is with RSS.
6 You could go to any number of Punchout sites, choose
7 items, bring them back into the -- into a single
8 requisition, and then run the PO 100 purchase order
9 program and generate as many purchase orders as there were
10 distinct vendors.

11 Q So when you went to the 100 Punchout sites, how many
12 punchouts do you have do in connection with that process?

13 A 100.

14 Q And then were there any -- strike that. How many
15 purchase orders would be generated from a requisition
16 having items from 100 Punchout sites included on that
17 requisition?

18 A 100.

19 Q Now, would you be able to punch out to Punchout sites
20 simultaneously, or would you do that one at a time?

21 A You would do it serially.

22 Q Now, how would you punch out to 100 Punchout sites
23 using the RQC configurations?

24 A You'd punch out one at a time, so serially.

25 Q So the same way that you did it with RSS?

1 MR. THOMASCH: Objection; mischaracterizes the
2 testimony and the facts. It's a leading question of her
3 own witness.

4 MS. ALBERT: I'll withdraw the objections.

5 THE COURT: That's a lot of objections.

6 MR. THOMASCH: It was a very objectionable
7 question, Your Honor.

8 THE COURT: He's saying it's leading. Let's
9 start with that. Do you want to --

10 MS. ALBERT: I'll rephrase.

11 Q So can you tell us whether or not you would have to
12 punch out one at a time with respect to RQC configurations
13 in order to go to 100 Punchout sites?

14 A Yes, you would.

15 Q And how many requisitions would you have to build from
16 punching out to 100 Punchout sites using the RQC
17 configurations?

18 A 100.

19 Q How many purchase orders would be generated by the
20 systems having RQC?

21 A 100.

22 Q And does claim 26 indicate that you have to have all
23 items selected from multiple vendors in a single
24 requisition?

25 MR. THOMASCH: Objection to form and asking the

1 witness for claim construction.

2 Q Is there any requirement in claim 26 --

3 THE COURT: Do you want to open that door? I'm
4 talking to her.

5 MS. ALBERT: I'm trying to compare the
6 functionality of the two systems.

7 THE COURT: Maybe you can figure out a different
8 way to do it than asking for a claim construction. It's
9 the same with their expert giving claim construction. I
10 think that's not where we are.

11 Q Is it relevant to claim 26 the number of requisitions
12 that have to be generated?

13 MR. THOMASCH: Objection. I believe Your Honor
14 is the only one that can make a relevance ruling, and the
15 witness can't give a factual question on relevance, and
16 doing so embeds a claim construction in his answer.

17 THE COURT: I think that it's probably my
18 responsibility to rule on relevance, but if you want to
19 ask him something else.

20 MS. ALBERT: I have no further questions.

21 THE COURT: Okay.

22 THE WITNESS: Thank you.

23 MR. THOMASCH: Very briefly, Your Honor?

24 THE COURT: What are we; California rules? You
25 brought Mr. Dusseault, so you can have those. All right,

1 but no more.

2

3 RECROSS-EXAMINATION

4 BY MR. THOMASCH:

5 Q Just for clarity, in the examples that you were just
6 given, under RQC, you need to do 100 separate
7 requisitions, and all of that could have been on one
8 requisition with RSS; correct?

9 A Correct.

10 MR. THOMASCH: Nothing further.

11 MS. ALBERT: Just a point of housekeeping, I'm
12 reminded that in Dr. Weaver's direct examination, we had
13 discussed Plaintiff's Exhibit 1110, and I failed to move
14 that into evidence.

15 THE COURT: You did not.

16 MS. ALBERT: I'd like to move that into evidence.

17 THE COURT: Any objection to 1110?

18 MR. THOMASCH: Your Honor, might I have a moment
19 to find it?

20 THE COURT: Oh, why? Why do you need to know?
21 What's your answer? Sure.

22 MR. THOMASCH: We did object in the past, Your
23 Honor, so I'll make the objection.

24 THE COURT: Is it on the agreed list or not?

25 MS. ALBERT: It's not, but the only objection was

1 relevance, and I would say it was relevant to show how
2 Lawson characterized the differences between RSS and RQC.

3 THE COURT: I remember the exhibit. The
4 objection is overruled. It's admitted.

5
6 (ePlus Exhibit 1110 admitted.)

7
8 THE COURT: Is that it?

9 MR. THOMASCH: Yes, sir.

10 THE COURT: Well, in the old days we would take
11 an hour and a half for dinner and be back, and we would
12 sit until 11:00, but that was the old days. How many more
13 witnesses are you calling? We'll start in the morning at
14 9:30.

15 MS. ALBERT: We have three more witnesses on
16 colorability.

17 THE COURT: So you expect that they'll all be on
18 tap in the morning.

19 MS. ALBERT: Correct.

20 THE COURT: And then how many witnesses do you
21 have on infringement? I'm just trying to make some plans.
22 I'm not asking you to make your final cut. Your best
23 judgment is all I can ask for.

24 MS. ALBERT: Four witnesses total, I believe, on
25 infringement.

1 THE COURT: We'll start at 9:30 in the morning
2 with your witnesses continuing the hearing on
3 colorability.

4
5 (End of proceedings.)
6
7

8 We certify that the foregoing is a correct
9 transcript from the record of proceedings in the
10 above-entitled matter.
11
12

13 /s/
14 P. E. Peterson, RPR

Date

15
16 /s/
17 Diane J. Daffron, RPR

Date
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